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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 200

A. L. COUPE CONSTRUCTION CO., INC., A. L. COUPE AND E. G. BARKER, *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Claims

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## Petition for a Writ of Certiorari to the United States Court of Claims

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*To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your Petitioners, A. L. Coupe Construction Company, Inc., A. L. Coupe, and E. G. Barker, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, dated March 6, 1955.

## OPINION BELOW

The opinion of the United States Court of Claims is reported in 139 F. Supp. 61, — Ct. Cls. —. The opinion is submitted herewith as an appendix to this petition.

## STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Claims and its judgment in favor of Respondent below was made and entered on March 6, 1955. No petition for rehearing was filed.

Upon application of Petitioners dated May 29, 1956, the Honorable Earl Warren, Chief Justice of the United States, entered an order extending the time for the filing of a petition for a Writ of Certiorari in this case to and including June 25, 1956.

The nature of the case is stated below at pages 3 to 9. This Court has jurisdiction of the questions presented under the provisions of Title 28, U.S.C. Sec. 1255(1).

## QUESTIONS PRESENTED

1. Should a Federal Government contracting officer have the right and power to require government contractors, as a condition precedent to payment of the amounts due under the provisions of a government contract, to release all claims for damages for breach of contract, or to state, as a condition of the receipt of such moneys, the amounts of their claims for damages for breach of contract, and by virtue of such release limit such claims to the amounts so stated.

2. Should Government contracting officers, who have no authority to consider, settle, and adjust claims for damages for breach of contract, have power to require a release of claims which they neither have power to entertain nor power to pay, as a condition precedent to the payment of monies admittedly due under the provisions of a Government contract.

3. In an action against the Federal Government, for damages for breach of contract, may the Federal Government evade the burden of establishing the affirmative defense of release, and should a purported release not

supported by consideration, or invalid for other reasons, take on validity merely by reason of the fact that it was given to the Government.

4. May the Federal Government, unlike any private person, be exonerated from damages for breach of contract merely because it was not negligent in connection with the action alleged to constitute a breach.

5. May the Federal Government withhold monies otherwise due a Government contractor, for "housing" its employees without any contract expressed or implied, and merely on the basis that other contractors in the area knew of the requirement.

## STATUTES INVOLVED

The general principles here involved encompass the general authority of Federal Government contracting officers, the validity of Government contract provisions, and the powers of Commissioners in the Court of Claims.

The only statute directly involved is Title 31, U.S.C. § 71. This statute reads as follows:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

## STATEMENT

Petitioners, a limited partnership doing business under the name "Coupe Construction," brought suit against Respondent in the United States Court of Claims to recover damages for an alleged breach of the express and implied provisions of a contract to construct housing facilities for Respondent at Oak Ridge, Tennessee, in 1943 and 1944. Petitioners based their claims on the allegations that: (1) Defendant failed to stockpile lumber in the required sizes

and quantities needed at a single location at or near the site of the work; (2) Respondent interfered with the Plaintiff in the hiring and recruiting of labor; (3) Respondent failed to construct and maintain adequate roads in the vicinity of the work; and (4) certain amounts had been illegally deducted from the contract price for the lodging of Petitioner's employees during the construction period.

The Respondent denied any liability for losses on account of the failure to stockpile lumber, for the recruitment of labor, or for the conditions of the roads, and asserted a legal right to the sum deducted for the housing of Petitioner's employees. In denying liability on account of the failure to stockpile lumber, Respondent alleged that it was not responsible because it had not been negligent. In addition, the Respondent asserted that the claims in suit were released by Petitioners upon completion of the work and that Petitioners had not shown that it suffered any damages due to any actions of the Respondent.

The specifications, incorporated in and made a part of the contract, stated in part as follows:

> "Lumber in the grades indicated in the form of bid has been or will be procured by the contracting officer and will be stockpiled for the use of the contractor at the site * * * *"

The specifications also stated that the contractor should visit the site to determine "the location of the lumber stockpile referred to" above. Prior to the time the contract in question was entered into, Petitioners were informed by letter that the lumber stockpile was being established at a certain lumber yard. (App. 2, 33.)

The contract also contained the following provision (Article 16(d); App. 17, 18):

> "Upon completion and acceptance of all work required hereunder, the *amount due* the contractor *under this contract* will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government

> with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein." (Italics supplied.)

Upon completion and acceptance of the housing facilities, the Respondent determined the amount due and demanded a release. At that time, there being ten (10) claims made by Petitioners for adjustments in the contract price, a purported release was prepared excepting such claims, all of which were stated. This release was signed:

> Coupe Construction
> by A. L. Coupe, Partner. (App. 28, 29)

All of the claims asserted were of the character which could have been considered settled and adjusted under one or more of the articles of the contract, with the possible exception of Item 8. (App. 27, 29). As a matter of fact the contracting officer subsequently allowed and paid Items 4, 5 and 6, and on appeal to the War Department Board of Contract Appeals, Items 1, 2, 3, and 9 were allowed. (App. 29.) Items 7 and 10 were denied under the provisions of the contract and Item 8 was denied as not within the Board's jurisdiction, as it constituted a claim for damages for breach of contract. (App. 30.)

Petitioners established during the trial of the case in the Court of Claims that lumber in the grades and sizes specified was never stockpiled for use of Petitioners at any single location at or near the site of the work, but that on the contrary, Petitioners were required to obtain lumber from five different lumber yards in the Oak Ridge area, some of which were many miles apart. (App. 22, 32-36.) Petitioners also established failure to construct and maintain roads, interference with the hiring and recruiting of labor, and absence of any contractual relationship, ex-

pressed or implied, to pay the Respondent for the cost of housing labor. (App. 38, 39, 40, 45.) To establish its right to withhold the amounts deducted for the cost of housing Petitioner's labor, Respondent counterclaimed.

During the trial of the case, Respondent amended its answer to set up the affirmative defense of release, based upon the purported release referred to *supra*. Petitioner's took the position that the release was not effective, first, because A. L. Coupe, who executed the same was a limited partner, and as Respondent knew or should have known had no authority to bind the partnership, and second, that the release could not extend to claims for damages for breach of contract. This latter contention was based upon the fact that the contracting officer, being without authority to consider, settle, or adjust claims against the Government for damages for breach of contract, was without power or authority to require a release of such claims, no part of the payment made can furnish the consideration for such a release, and that, therefore, the release was without consideration to the extent that it could be construed as applicable to breach of contract claims.

In support of their position that the release was not binding because of the incapacity of A. L. Coupe, Petitioners established that prior to the time the contract here in question was entered into, Petitioners had furnished the Respondent with a certified copy of their Articles of Copartnership, which provided that A. L. Coupe Construction Co., Inc., was to be the general and managing partner of Coupe Construction; that A. L. Coupe and E. G. Barker were to be limited partners; and that neither of the limited partners were to transact any business for the partnership, to take any part in the management of the partnership, or sign for or bind the partnership. These provisions were consistent with the provisions of the Law of the State of Kentucky under which the limited partnership was

organized. At the same time the Respondent was furnished with a certified copy of a resolution of the Board of Directors of A. L. Coupe Construction Co., Inc., the general and managing partner authorizing only its Vice-President, A. W. Mueller, to execute all contracts, letter contracts, and other documents and to do all things and perform all acts necessary or incidental to the management and operation of Coupe Construction by the corporate general and managing partner. (App. 30, 4, 5).

The Court of Claims, however, decided that the release covered all breach of contract claims, save only to the extent that by its terms it excepted such claims by description and amount. That Court, thereupon, decided that the claims for damages for failure to maintain adequate roads and for interfering with the hiring and recruiting of labor were released. (App. 8.) It also decided, although the Respondent had the affirmative on this issue, that although A. L. Coupe had no authority to bind the partnership, that when he executed the release, it must be presumed that he signed in a lawful capacity in the absence of evidence to the contrary. In so doing, the Court ignored the fact that he signed "Coupe Construction, by A. L. Coupe, Partner", and that the purported release itself made no reference to the corporate and managing partner. (App. 5.)

The Court of Claims then proceeded to find that Item 8 of the exceptions to the release covered the claim for damages for breach of the stockpiling provisions of the contract, but limited the claim to $15,708.41. Petitioner's claim for damages for failure to stockpile was $323,588.54. The Court also found that the claim for amounts withheld from the contract for housing Petitioners employees was also excepted from the release. Accordingly, it limited its decision to these two items and in the amounts set forth in the exceptions to the release.

The Court's decision on these two items is to say the least confusing. It appears to decide that Petitioner's claim

for damages for failure to stockpile is in reality for what it calls failure to "advance stockpile", and then says that the contract does not require advance stockpiling. But stockpiling can mean nothing but collecting and storing in advance. It ignores entirely the delays and damages resulting from the necessity of obtaining lumber from five different lumber yards instead of the "stockpile" referred to in the contract. It says (App. 9) that Petitioners were not delayed for lack of lumber and then adopts the Commissioners Report and finds (App. 37) that Petitioners were delayed to an undetermined degree because of the failure to supply lumber. It then adds that in any event the Government was not negligent and therefore not liable for breach. On the question of the amounts withheld on Respondent's claim for the cost of housing furnished Petitioner's employees, the Court finds that the Petitioners were "aware" that it would be expected to pay for such services (App. 15), and then it finds (App. 45) that the record fails to disclose any specific instance in which Petitioners were advised of the financial arrangements concerning the housing of its employees.

Finally the court adopts an inaccurate set of so-called Findings of Fact reported by its commissioner. These Findings are confusing, do not accord with the evidence in many instances, are inconsistent and contain arguments in favor of Respondent. Rule 48(c) of the Rules of the Court of Claims does not permit the commissioner to file recommendations for conclusions of law unless directed to do so by the court. In this case, recommendations as to conclusions of law and arguments in Respondents favor are made in at least two instances (App. 30, Fdg. 13; App. 40, 41, Fdg. 31; App. 45, Fdg. 41).

## REASONS RELIED UPON FOR GRANTING THE WRIT

### I

### THE UNITED STATES COURT OF CLAIMS HAS DECIDED FEDERAL QUESTIONS OF SUBSTANCE AND OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF GOVERNMENT CONTRACTS WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

**1. The decision herein, which sustains a requirement imposed on government contractors by contracting officers that, as a condition precedent to receiving payment of monies admittedly due under the contract, (a) all claims including claims for damages for breach of contract be released, or (b) the amounts of such claims be stated for the purpose of limitation thereof to such stated amounts, confers powers on government contracting officers which are contrary to the principal that when the government steps down from its sovereign position to contract with its citizens it must be treated as are private contractors in analogous situations and which are not sanctioned by legislation.**

**A. The decision herein gives validity to a purported release of the government from liability for damages for breach of contract, even though the purposted release is not supported by consideration.**

The undisputed facts in this case demonstrate that no consideration was paid for the purported release. Instead, the "release" document was exacted from the contractor as a condition precedent to the making of the final payment due from the Government under the contract. The contractual provisions, *supra*, so states. It is elementary that a payment, already legally due, is not consideration for a release. *Restatement, Law of Contracts*, Vol. 1, Sec. 76, Page 85.

The Court below, apparently based its decision on the fact that the contractual provision, Article 16(d) of the contract, *supra,* required the execution of the release without consideration. *P. J. Carlin Construction Co.* v. *United States,* 92 C. Cls. 280. No effort was otherwise made by the court to find any consideration to support the purported release. In its briefs to the court below, Petitioners urged that the court review its prior decisions in the light of the contentions made that the purported release was not supported by consideration, was invalid for lack of proper execution, and was based upon the exercise of a power which the contracting officer did not have. The court, however, ignored Petitioners' request.

Respondent will undoubtedly contend that this Court's decision in *Cramp & Sons* v. *United States,* 206 U.S. 118, 27 S. Ct. 676, 51 L. Ed. 983, supports the proposition that the contractual provision requiring the release is in itself consideration for a release of a claim for breach of contract. It is suggested, however, that that case is not authority for that proposition. There, the release was based upon a contractual provision setting up a special reserve for security for the guaranteed performance of a vessel being constructed. The reserve was to be paid to the contractor upon the execution of the specified release, and the release was to be in such form as was specified by the Secretary of the Navy. The release, which was given under seal, was in fact a mutual release. The Government released the contractor from its guarantee that the vessel, known as Coast Line Battleship No. 1, would meet the performance requirements of the contract. The contractor released the Government from all claims. This Court said (p. 128):

> "No payment of moneys not due is necessary to sustain this release. It is under seal, and the contract is itself full consideration."

This is an entirely different situation from the one presented here. Here, the release was not under seal, nor

was it supported by any payment other than the amount admittedly due, and there was no corresponding release by the Government of contractual obligation. In fact, under the terms of the contractual article involved, the release was not to be given nor the amount due paid until *after* completion and acceptance of all of the work required under the contract.

**B. The decision herein goes so far in its effort to sustain the release requirement mentioned above, that in the face of a purported release invalid because of lack of authority of the limited partner who signed it the Court relieved the government of the normal burden of proving the affirmative defense of release.**

The Government did not originally plead the affirmative defense of release in this case. After Petitioners had completed their prima facie case, however, the Government sought to amend its answer to set up this defense. This it was permitted to do.

It is elementary that the burden of pleading and proving the validity of a claim to release is on the proponent thereof. The release in this case was not complete and regular on its face. It was signed by a limited partner. The Respondent knew that A. L. Coupe was a limited partner. The fact that he was also President of the General and Managing Corporate Partner was immaterial. He didn't purport to sign for the corporate managing partner. He signed "Coupe Construction" (the limited partnership) by—A. L. Coupe, Partner. The Court of Claims concedes that (App. 5) "If Mr. Coupe signed as a special partner, there could be no doubt that his signature in that capacity, under the Kentucky law, could not bind the partnership". But then the Court goes on to say: "However, when he signed 'Coupe Construction'—by A. L. Coupe, Partner, it must be presumed that he signed in a lawful capacity in the absence of evidence to the

contrary". This statement has no meaning. "Coupe Construction" was the name of the limited partnership. It wasn't as if he had signed the name of the corporate general partner; i.e., "A. L. Coupe Construction Co., Inc.—by A. L. Coupe, Partner." The authorities cited in support of its statement that "it must be presumed that he signed in a lawful capacity" are not applicable, to say nothing of the errors in citation. The case of the *President, Directors, and Company of the Bank of the United States* v. *Dandridge, et al.*, is to be found in 25 U.S. 64, 12 Wheat. 64, 6 L. Ed. 552, and not in 7 U.S. 29, 33-34, 12 W. 69, 70. However, that was a case involving the validity of a cashier's bond and the quantum of proof required of the approval thereof by the Board of Directors. The case of *Klamath & Moadoc Tribes of Indians, et al.* v. *United States*, 296 U.S. 244, 253, involved a release given by the indian tribes under a statute authorizing the Secretary of the Interior to pay the Indians for certain lands taken by the United States, upon receipt of a release from the Indians of all claims for payment for such lands. The release was given, and the appropriated funds were paid over. Later, the Indians questioned the validity of the release. This was a situation completely unlike that presented here. The case of *Kentucky* v. *Adams Express Company*, 93 U.S. 174, 23 L. Ed. 872, held that an express company could not stipulate against liability for the negligence of its agent. The case of *Mitchell* v. *United States*, 21 Wall. 350, 353, 22 L. Ed. 584, involved the question of the validity of a contract between a northern resident and a southern rebel during the Civil War. It laid down rules and regulations for determining domicile.

**C. The decision herein confers upon Federal contracting officers a power which is denied to them by statute.**

The Congress has never seen fit to confer upon Federal Government contracting officers any general authority to consider, settle, or adjust claims against the United States. Title 31, U.S.C. Sec. 71, which was originally enacted as

R. S. § 236; June 10, 1921, c. 18, Title III, Sec. 305, 42 stat. 24, took its derivation from the Act of March 3, 1817, c. 45, Sec. 2, 3 stat. 306. It was a part of the Budget and Accounting Act of 1921 which generally amended and codified the system for general supervision, by the Comptroller General, of the expenditure of appropriated funds. See *Globe Indemnity Company* v. *United States,* 291 U.S. 476, § 54 S. Ct. 499, 78 L. Ed. 924. Under this act has arisen the practice of permitting contracting officers to determine the amounts due *under* the provisions of a Government contract even though to do so involves the making of a finding of fact. See the so-called Wunderlich Legislation (Public Law 356, 83rd Congress, 2nd Session; 41 U.S.C. 321, 322) which resulted from this Court's decision in the case of *United States* v. *Wunderlich,* 342 U.S. 98, 72 S. Ct. 154, 96 L. Ed. 113. See also, *United States* v. *Joseph A. Holpuch Co.,* 328 U.S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192.

Examples of contractual provisions which authorize the contracting officer to make determinations of the amount due under the contract, may be found in such standard articles as those permitting termination for the convenience of the Government and payment to the contractor of fair and just compensation for the work done and the preparations made on the terminated portion of the contract, those permitting an equitable adjustment in the contract price for the cost of changes made in plans and specifications, and those permitting an equitable adjustment in the contract price for costs resulting from delays in the delivery of government furnished materials or for changed conditions encountered during performance. Under the standard "Disputes" article of Government contracts, which was included in the contract here in question, the contracting officer may agree with the contractor as to these adjustments, or in the case of a "dispute concerning a question of fact, determine the amount of the adjustment finally and conclusively, subject only to appeal to the head of the depart-

ment concerned." However, the power of the Comptroller General to post-audit and second guess the contracting officer continues to exist. House Report No. 1380, 83rd Congress, 2nd Session, p. 5, points out that the Wunderlich Legislation, *supra*, was not intended to change the existing jurisdiction of the General Accounting Office either in the course of settlement or upon audit, and that the legislation was not intended to be construed as limiting the review by the General Accounting Office to the fraudulent intent standard prescribed by the Wunderlich decision, *supra*.

The net result of all of this is to leave the contracting officer in the following position. Where Congress has, by statute, specifically authorized contracting officers to adjust and settle particular classes of claims and demands against the United States, he may do so subject to the audit procedure in the General Accounting Office. Similarly, if it is provided in a contract that under certain circumstances the contracting office may determine particular facts, such determination, if made within the contractual provisions, will result in payment, similarly subject to such audit. But in this latter case the claim that is made, and which is either settled by agreement or determination, must arise *under the contract;* that is, it must be based upon a contractual privision. *20 Comp. Gen. (1941) 573, 579.*

But where there are no contractual provisions of this character, where the claim is for damages for breach of the express or implied provisions of the contract, the contracting officer is without power. In such cases, the power to consider, settle, and adjust such claims lies either in the Comptroller General, under the provisions of Title 31, U.S.C. Sec. 71, or in the United States District Courts and in the Court of Claims under the Tucker Act.

Therefore, in cases such as the one presented here, the contracting officer has no authority to consider, settle, or adjust contractor's claims for damages for breach of contract. Yet, by the terms of the contract article and of the release specified, he requires the contractor to execute a release which extends to claims concerning which he is

powerless to act. If the contracting officer has no authority to settle or adjust claims for damages for breach of contract, how may he presume to require the contractor, upon the payment of money due, to release the Government from breach of contract claims or to state an amount beyond which the contractor will make no claim for such damages. If he can do so, then in a given case, might he not be persuaded to pay more than a claim arising under the provisions of the contract was worth, under the guise of obtaining a release of all claims.

But there is a parallel problem to be considered here. To give effect to the purported release perpetuates a wide spread practice of the Government in the administration of Government contracts which is grossly unfair to contractors. It is wholly indefensible for the Government to use its powerful bargaining position to exact purported "releases" as a condition of making payments otherwise due. Contracting officers who have no authority to compromise claims for breach of contract or to pay any consideration for a "release" thereof ought not be permitted to require a contractor to execute a document purporting to release those claims. This is particular true where the purported release is wholly unsupported by consideration and has no legal validity. The decision of the Court below sanctioned this practice, without even passing on the vital question of the validity of the release. It is submitted that this practice cannot be permitted to stand, if the Government is to maintain an honorable course of dealing with its contractors and not abuse its enormous bargaining power.

**2. The decision herein permits the Respondent, unlike private contractors, to escape liability for damages for breach of contract merely because it was not negligent.**

One thing which was not disputed during the trial of the case below was that the Respondent did not stockpile the lumber at a single location at or near the site of the work. It was also conceded that the Petitioners were forced to secure lumber from five different lumber yards in the Oak

Ridge area, which consisted of an area of about forty-seven miles long and twenty miles wide.

It cannot be disputed either that the specifications which became a part of the contract, required the Respondent to stockpile the lumber at the site. The decision of the Court of Claims, however, ignores completely the ordinary meaning of the word stockpile. Webster's New Collegiate Dictionary, 1949 Edition, defines stockpile as "a storage pile; a reserve supply of an essential raw material; processed food or the like accumulated within a country for use during a war-induced shortage". It also defines "stockpiled and stockpiling" as "to accumulate a stockpile."

It thus seems clear that the obligation of the Government was to "accumulate" a "reserve supply" or "a storage pile" of lumber at the site for Petitioners' use. The lumber should have been there before the contractor required it. But the Government failed to accumulate any such reserve supply of lumber for Petitioners' use.

The Court below wholly ignored the dictionary meaning of this key word "stockpile." It shrugged off this vital factor and dismissed it by ignoring the contract terms and stating that what Petitioners were actually contending for was "advance stockpiling" (App. 12). The use of this phrase is a contradiction in terms. Stockpiling can only mean the accumulation of a reserve supply of lumber in advance of its use or of the need therefor.

To then hold, that because the Government exercised due diligence within this large area in attempting to have lumber available in five different lumber yards, was not negligent, and that therefore there was no breach of contract, simply ignores the basic concept of breach of contract. The Government can occupy no favored position in the field of contracts. This Court has repeatedly held that when the Government steps down from its sovereign position to contract with its citizens, it is subject to the same rules that apply to contracts between private individuals. *United*

*States* v. *Standard Rice Co.*, 323 U.S. 106, 65 S. Ct. 145, 89 L. Ed. 104.

The reference to the provisions of the specifications stating that "delay" in delivery of materials to be furnished by the government will form no basis for a claim against the government is made by the court in an effort to justify its "no negligence, no breach" doctrine. But "delay" in delivery and "stockpile" are two separate and distinct terms. If not, they are ambiguous, and must be construed against the Respondent who drew them. *United States* v. *Standard Rice Co., supra; Hollenbach* v. *United States*, 233 U.S. 165, 34 S. Ct. 553, 58 L. Ed. 808; *Merritt* v. *United States*, 95 C. Cls. 421.

But the Court of Claims didn't stop there. It went on to say that the Petitioners were not delayed by the lack of lumber (App. 9). To make such a statement in the face of the fact of failure to stockpile and requiring the Petitioners to obtain lumber from five different lumber yards in an area forty-seven miles long and twenty miles wide indicates that the Court below was bound and determined to close its eyes to the merits of Petitioners' case. This is further demonstrated by its absolutely opposite finding on page 37 of the Opinion (App.) that "the record shows that Plaintiffs *were* delayed to an undetermined degree because of the failure of Defendant to supply lumber." (Italics ours.)

**3. The decision herein permitted the government to recover on its counterclaim (it was already holding the amount claimed) for the cost of housing certain of Petitioners' employees without evidence of any contract expressed or implied.**

The finding of the Commissioner, adopted by the court, states (at page 45, App.) that the record does not disclose any specific instance in which Petitioners were advised of the financial arrangements concerning the housing of their employees in the butments maintained by Respondent through its cost-plus-a-fixed-fee contractor. This finding, of

course, as in the case of other instances referred to below, contained an argumentative statement in favor of Respondent.

It is inconceivable to Petitioners that in the face of this finding the court could find that Petitioners were "aware" of the arrangements and base a contractual liability on this awareness.

## II.

## THE COURT BELOW HAS SO FAR DEPARTED FROM THE NORMAL AND ACCEPTED COURSE OF JUDICIAL PROCEDURE AS TO WARRANT THE SUPERVISION OF THIS COURT.

Although Petitioners earnestly contended during the hearing of this case before the Commissioner that the failure of the Respondent to stockpile the lumber at a single location at or near the site of the work constituted a breach of the contract, and that findings be made as to this failure, the Commissioner of the Court of Claims steadfastly refused to make any finding directly on this point. The point was thoroughly briefed to the Court, and was also ignored almost entirely by the Court.

Similarly, at the hearing before the Commissioner, Petitioners went to great lengths to prove the amount of damages sustained by reason of the alleged breaches of contract. It was obvious, that if Petitioners were required to obtain lumber from five different lumber yards, in an area some twenty miles wide and forty-seven miles long, instead of from a single "stockpile", that delays and extra costs would be incurred. Nevertheless, the Commissioner in his findings found, as has been previously indicated, in one part thereof, that Plaintiff was not delayed for the lack of lumber, and in another part that Plaintiffs were delayed to an undetermined degree because of the failure of the Defendants to supply lumber. The Court of Claims treated these findings so casually, that it adopted them and perpetuated the inconsistency of the Commissioner's findings.

The Commissioner was only given power by the Court to make findings of fact. But the Commissioner did not limit his report to findings of fact. His report in effect argues the case of the Respondent. See for example Finding 13, p. 30, App. The manner in which this is written is argumentative and not factual. Similarly, on the question of damages, Finding 41, p. 45, App., the statement that it is believed that the "$30,000.00 by which Plaintiffs were allowed to increase their bid is sufficient to offset such increase" is clearly argumentative and not factual. Nevertheless, the Court of Claims adopted these findings as its own.

After the hearing before the Commissioner, and on the requests of the parties for findings, the Respondent insisted upon treating the amount of $30,000.00, by which Petitioners had been authorized to increase their bid to cover the cost of housing, feeding, and transportation of labor for the project, as including "the cost of hiring, housing, feeding, and transportation of labor" for the project. That was, of course, designed to meet Petitioners' claims for damages for interfering with the "hiring" of labor. As a matter of fact the allowance was for the "housing, feeding and transportation" of labor (App. 24). The Commissioner, nevertheless, carried into his report, (Finding 27 and 28) that the $30,000.00 increase had been an allowance for hiring, housing, feeding, and transporting labor.

A careful examination of the Commissioner's report of his findings, and the request for findings by the Respondent, leads only to the conclusion that the Commissioner in fact did not make independent findings, but adopted almost, in toto, the Respondent's request for findings. This explains the argumentative nature of the findings and the inconsistencies that have been demonstrated. Petitioners question seriously, whether the Commissioner ever examined the record or considered the requests of both parties for findings.

The facts in the case were voluminous and complicated. There were over 800 pages of testimony taken. Neverthe-

less, when it came to argument of this case before the Court, Petitioners' counsel was only allowed thirty minutes for argument.

Finally, it is to be noted that the Court's cavalier treatment of the question of absence of consideration, of the serious question as to the authority of the contracting officer, of its summary rejection of Petitioners' allegation that one of its limited partners had no authority to bind the partnership in the release and its citation of inapplicable authorities for the proposition that the burden of establishing the invalidity of a release, incomplete and irregular on its face, was on Petitioners, all indicate a serious lack of attention to the claims of Petitioners in this case. Fair treatment of Government contractors, and due process by the Courts in considering their serious claims for damages for breach of contract are essential to the continuance of satisfactory relations between the Government and the citizens with whom it must contract. Petitioners in this case were not afforded that fair treatment by the contracting officer, or the precision and care in the consideration of its claim, that should have been accorded to them by the Court of Claims.

The circumstances and conditions here set forth, it is submitted, call for the exercise by this Court of its power of general supervision to the end that there will be stabilization of relations between the Government and its contractors in this important field.

Respectfully submitted,

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# In the United States Court of Claims

No. 50276

(Decided March 6, 1956)

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A. L. COUPE CONSTRUCTION CO., INC., A. L. COUPE AND E. G. BARKER, PARTNERS AND CO-ADVENTURERS, AND CITIZENS UNION NATIONAL BANK OF LOUISVILLE, KENTUCKY v. THE UNITED STATES

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*Mr. Robert Sheriffs Moss* for the plaintiff. *Mr. Bailey Walsh* and *Mr. Ralph E. Becker* were on the briefs.

*Mr. Paris T. Houston*, with whom *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

This action is brought by plaintiff [1] to recover damages for an alleged breach of the express and implied provisions of a contract to construct housing facilities for defendant at Oak Ridge, Tennessee, in 1943 and 1944.

Plaintiff bases its claims upon allegations that (1) defendant failed to stockpile lumber in the required sizes and quantities needed at a single location at or near the site of the work; (2) defendant interfered with plaintiff in the hiring and recruiting of labor; (3) defendant failed to construct and maintain adequate roads in the vicinity of the work; and (4) for the return of amounts deducted from the contract price for lodging plaintiff's employees.

Defendant denies any liability for losses on account of unavailability of lumber, recruitment of labor, or condition of the roads and asserts a legal right to the sum deducted for housing plaintiff's employees. In addition, defendant

[1] Plaintiffs, operating as a partnership, will be referred to as plaintiff.

asserts that the claims in suit were released by plaintiff upon completion of the work, and that plaintiff has not shown that it suffered any damage due to any actions of defendant.

The questions presented are: (1) whether plaintiff has released defendant from the claims asserted in this suit; (2) whether plaintiff suffered any unrecovered loss due to the lack of all the lumber at a single location in the sizes and quantities required and, if so, whether defendant is liable therefor; (3) whether the roads on the site of the work were different from what plaintiff should have contemplated and, if so, whether it suffered any loss and damages by reason thereof and whether defendant may be held liable for any of it; (4) whether the conditions controlling the hiring and recruitment of labor for the work were different from that which plaintiff expected or should have expected before the award of the contract and, if so, whether defendant is liable for any loss suffered thereby; (5) whether plaintiff's losses on the contract in connection with any particular conditions or actions of plaintiff or defendant can be ascertained and separated in order to determine the amounts, if any, due as damages; (6) whether defendant is entitled to retain moneys assessed and withheld from plaintiff's contract pay or collected from plaintiff for the cost of lodgings for plaintiff's employees.

In this posture of the case, the first question to be passed upon is the assertion of defendant that all the claims in suit, except the hutment claim, have been released.

After the completion of the work and during the latter part of 1944, plaintiff filed claims with defendant for additional compensation in connection with its work under the contract. On March 5, 1945, a formal claim asserting 10 itemized claims in the total amount of $72,543 was filed. On March 17, 1945, a final payment voucher in the amount of $73,437.16, covering monthly pay estimate No. 10 and marked "final" was sent to plaintiff with the request that the certificate of the payee thereon be executed along with a release, as required by the contract, and returned to defendant in order that final payment may be made. Previously plaintiff had been requested to execute a release with the advice that the final pay estimate was being prepared

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and the release would be required in connection therewith. Mr. A. L. Coupe complied with the request and signed and submitted to defendant a release along with pay estimate No. 10. Payment on the estimate was made on April 2, 1945. No retained percentages were withheld from this estimate for the purpose of keeping the contract open. The release, in pertinent part, is as follows:

RELEASE

Approved by the Under Secretary of War March 22, 1941

The work under contract number W-7421-Eng-4 dated 11-16-43 between the United States of America, represented by E. H. Marsden, Col., Corps of Engineers, as Contracting Officer, and the undersigned contractor, having been completed and finally accepted, the United States, its officers and agents, are hereby released from all claims and demands whatsoever arising under or by virtue of said contract, except as follows:

See list attached.

Executed this 24th day of March 1945.

COUPE CONSTRUCTION,
(Contractor)

By A. L. COUPE [s],
(Official Title)

*Partner.*

* * * * *

Subsequently the contracting officer allowed the claims as listed in items 4, 5, and 6 of the specifications, and on appeal the head of the department allowed items 1, 2, and 3, and payments thereon have been made to plaintiff in the total amount of $16,156.54. The claims set out in items 7, 8, and 10 of the specifications were denied by the contracting officer and the head of the department. Item 9 of the claim for hutment charges was allowed to the extent that it was found that the hutment services were not part of the construction contract and the deductions thereon could not be made from the construction contract. Item 7 of the claim was denied by the head of the department on the grounds that the invitation to bid was not an offer to sell lumber to plaintiff at the prices stated therein, but was merely for the purpose of evaluating bids and that the price for such lumber sold must be determined by other standards of value

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and pricing. Item 8 of the claim was denied on the grounds that the contract had provided for extensions of time, but not for damages for delays due to any delay in the receipt of materials, equipment, or supplies to be furnished by the Government. Item 10 of the claim was denied on the grounds that plaintiff failed to establish proof of any basis for the claim. The board observed that the record before it showed each change order allowed additional sums based upon amounts requested by the contractor, or amounts arrived at after negotiations, and there was included in such amounts items of ten percent for overhead and ten percent in addition for profit, and further, the record showed no reservation of additional claims in connection with overhead. Plaintiff now says that the release above-quoted was without force and effect because it was not signed by the general partner, A. L. Coupe Construction Company, Inc., but by A. L. Coupe, one of the special partners.

On November 13, 1943, the board of directors of the A. L. Coupe Construction Company, Inc., adopted a resolution which "authorized, empowered, and directed" Mr. Mueller to "execute all contracts, letter contracts and other papers, and do all things and perform all acts necessary or incident thereto" in connection with construction at Oak Ridge. The form for signature was specified as "Coupe Construction, by A. L. Coupe Construction Company, Inc.—General Partner, by—C. W. Mueller, Vice President." However, this instruction appears to have been almost completely ignored.

Mr. Coupe was not only one of the limited partners, but also was president of the general partner, the corporation, and as such was the individual and practical control of the partnership operations. It is true that by the laws of Kentucky, under which the partnership was formed, and by the articles of partnership, the limited partners were without authority to sign for the partnership and such authority was vested only in the general partner. While Mr. Mueller was project engineer authorized to act for the managing partner and did so act at times, the record discloses that it was almost the uniform practice of the partnership in signing various documents, including the acceptance of change orders, to disregard the stated requirement and omit the

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designation of the corporation general partner as signatory thereto. Neither Mr. Coupe nor Mr. Mueller appeared to have used the name of the corporation which was the managing partner in connection with their signatures on any letters.

The plaintiffs in this suit joined in a partnership to do business under the partnership name of "Coupe Construction." That name was used to accept the contract here involved. It was used to accept the nine change orders to the contract. It was used to submit the various claims and all other correspondence to defendant. All official acts of the partnership were performed in the name of "Coupe Construction." The partnership business stationery was printed with the heading "Coupe Construction." The release was executed in the name of "Coupe Construction." It cannot be denied and is apparently conceded that "Coupe Construction" was the proper party to sign the contract and the release required by it. However, plaintiff says that Mr. Coupe had no authority to bind Coupe Construction in such a release and that Mr. Coupe signed as a partner and not as an official of the A. L. Coupe Construction Company, Inc., the managing partner.

The partnership agreement provided that the corporation as managing partner should devote its entire resources and personnel to the business of the partnership insofar as necessary, but that the special partners should take no part in the management of the business or transact any business for the partnership or sign for it or bind it. Mr. A. L. Coupe was not only one of the special partners, but also was the president of the corporation which was the managing partner. He knew he lacked authority as special partner to bind the partnership and from the facts in this case, it must be presumed that when he took official action in connection with the contract he acted as a representative of the corporation, which was the managing partner, and not for himself as a special partner. If Mr. Coupe signed as a special partner there could be no doubt that his signature in that capacity, under the Kentucky law, could not bind the partnership. However, when he signed "Coupe Construction—by A. L. Coupe, partner" it must be presumed that he signed in a lawful capacity, in the absence of evidence to the contrary. *The President, Directors, and Company*

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*of the Bank of the United States* v. *Dandridge, et al.*, 7 U. S. 29, 33-34 (12 W. 69, 70) : *Klamath and Moadoc Tribes of Indians, et al.* v. *United States*, 296 U. S. 244, 253; *Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174, 181; *Mitchell* v. *United States*, 21 Wall. 330, 353.

Thus, we conclude that the release is valid and binding upon plaintiff. The question then arises as to which claims in the suit were set out in the exceptions to the release, the rule being that claims not set out in an exception are released and cannot be sued upon. *P. J. Carlin Construction Company* v. *United States*, 92 C. Cls. 280, 305.

Article 16 of the contract, entitled "Payments to contractor," provides in pertinent part as follows:

* * * * *

> (d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

There were 10 exceptions. Subsequently the contracting officer paid Nos. 4, 5, and 6 and the head of the department paid Nos. 1, 2, and 3. Items 7 and 10 were denied by the contracting officer, but are not included in this case. Item 8 is for "additional costs incurred in transporting and handling lumber requirements," and would come under the claim in the petition that the Government failed to stockpile lumber in a single site and thereby breached the contract. Item 9 is for credit for hutment charges—amounts withheld on contract settlements and paid to Roane-Anderson Company.

Thus, items 8 and 9 are the only claims in this suit which were saved by plaintiff's exceptions to its release and are limited not only by the subject matter of the release and exceptions thereto, but also by the amounts set out in the exceptions. *See W. C. Shepherd* v. *United States*, 125 C. Cls. 724, 741; *Bein* v. *United States*, 101 C. Cls. 144; *Eastern Contracting Company* v. *United States*, 97 C. Cls. 341;

*P. J. Carlin Construction Company* v. *United States*, 92 C. Cls. 280; *United States* v. *Cramp & Sons*, 206 U. S. 118; *Pelton Water Wheel Company* v. *United States*, 55 C. Cls. 31; *Hartsville Oil Mill* v. *United States*, 60 C. Cls. 712; and *Eppes* v. *United States*, 62 C. Cls. 645.

Two questions are presented under plaintiff's claim for damages due to defendant's failure to stockpile lumber in a single site. First, did defendant breach the contract in that respect; and second, if so, did plaintiff suffer damage which can be ascertained.

A summary of the facts in relation to the lumber claim, is as follows. The lumber requirements for the Manhattan District were submitted to the Army Corps of Engineers who centrally procured lumber. Set forth in the requests would be the quantities, general sizes, and species of lumber required. The Corps of Engineers then placed orders for the lumber as requested. At times the mills became late in their shipment schedules and Stone and Webster, the managing contractor, pursuant to authority granted, procured lumber by direct purchase from any sources found available. In such cases procurement costs were higher to defendant. In addition to this, standing timber on the townsite was cut, a sawmill was established at the site, and lumber was fabricated from the logs and installed in the various houses and projects then under construction. In addition, Stone and Webster, pursuant to authority, fabricated smaller sizes of lumber from larger sizes when required. For example, 2″ x 4″s would be ripped from 2″ x 8″s. Lumber was in short supply and was secured from whatever source found available. Five million board-feet of lumber had been secured from the timbers in an ore dock at Mesabe Range and usable lengths and sizes fabricated therefrom. It was difficult to get adequate lumber in the required sizes and quantities, but the procurement policies and the organizations in question made it possible within a few hours to get lumber in the area when urgent. Seasoned lumber was sought but was not always obtainable and the shipments usually arrived in random lengths, requiring cutting and wastage. The 4,242,800 board-feet of lumber used by plaintiff in the construction of the housing required by the contract was approximately five percent

of the total amount of lumber handled at Oak Ridge during the same period. The lumberyards there were the largest in the Nation. At one time as much as 10,000,000 board-feet of lumber was on hand.

Before plaintiff accepted the contract it had performed housing construction work for the Government in other areas, particularly in Kentucky and Indiana. At those places the operations had been carried on through the process of establishment of a central point for the fabrication of lumber and through construction by specialized crews moving from one building to the next in sequence. Plaintiff expected to use the same procedure on the contract at Oak Ridge. However, no mention was made of such plans to defendant's agents and representatives prior to the time of the award of the contract or at any time during performance.

At the time plaintiff's representatives visited the site preparatory to bidding, the several lumberyards were in operation in Oak Ridge and were being used by other contractors. After the contract was awarded and after the letter contract was submitted, Mr. Coupe was orally advised by a representative of Stone and Webster, the managing contractor for the Government, that lumber would be secured for the construction of the housing project from the lumberyard for Townsite No. 3 and the location thereof was pointed out. On November 18, 1943, this representative of Stone and Webster wrote plaintiff that the lumber requirements for the housing project to be undertaken by plaintiff would be secured from Townsite Lumberyard No. 3 and set out certain procedures to be followed in handling the lumber, including a requirement that requisitions be made for lumber needed in ample time to permit the materialmen to verify the lumber as available. The letter further stated that it was intended that such quantities of lumber as requested would be available but in case a deficiency in some item was anticipated, plaintiff should contact a Mr. Morgan of Divison 4.

Plaintiff did use the lumberyard at Townsite No. 3 but at times it was necessary for it to procure lumber from other yards in the area. The supply of lumber was never depleted on the project but at times the required sizes, shapes and lengths were not present and it was necessary for Stone and

Webster to fabricate the lumber in the sizes needed from other available sizes. When lumber of longer lengths than was needed was furnished, plaintiff's project was not charged with the additional length. The additional lengths did not cause plaintiff any inconvenience because it was necessary to cut off the ends in order to square them even when the lumber submitted was of the required lengths. Thus, it was no more difficult to cut off the longer lengths in the squaring process than to cut off the smaller lengths for the same reason.

Plaintiff was not delayed for the lack of lumber and only one specific delay was shown which was as long as one day when it was impossible to get lumber of a tongue-and-groove variety for roofing. In that case, plaintiff was permitted to proceed by using square-edge lumber instead of the tongue and groove.

Defendant made every effort to provide plaintiff with lumber under very trying circumstances. Cost was not spared in this effort. There was no hesitancy on anyone's part to fabricate smaller sizes from larger sizes or to sacrifice longer pieces in order to provide requirements in shorter lengths. The operations of the lumberyards were so organized that the smaller yards could requisition their requirements from the larger central yard as the need arose. For this reason the contractors were requested to submit orders sufficiently in advance to permit such requisition. If due to lack of notice by a contractor it was impossible to fill such an order when the contractor's truck arrived, then whatever lumber was available in the smaller yard was furnished or the truck would proceed to the general lumberyard or some other yard where it was available. However, at all times when sufficient advanced warning was given of lumber requirements, Townsite Lumberyard No. 3 could cut lumber to order to fill a requisition if the proper sizes were not available or could bring in the required sizes and quantity from the general yard. It is good construction practice to submit orders for lumber sufficiently in advance to facilitate the filling of them on schedule. Plaintiff followed this practice at times, but at other times its trucks were sent to the lumberyard with the expectancy that orders would be filled immediately without proper advance warning. This faulty

procedure was at times responsible for any delays the contractor had in the receipt of lumber.

Plaintiff was furnished an area for its office and storage buildings and for a storage yard. It could have established a central lumber fabricating operation at that point if it had so desired. Plaintiff never requested permission to set up a central fabricating plant at any of the lumberyards or at its own area. It could have established such a plant in its own area without pemission to do so from anyone. Some of the other contractors did establish such plants in their own areas. Plaintiff did not at any time before the letting of the contract or during the course of the job complain that lumber was not being stored properly for it or that a central place for fabrication was not established, permitted, or available.

During the course of the construction work, plaintiff was furnished some green and otherwise defective lumber. Such was installed in the buildings and plaintiff was required to remove and replace it. It submitted a request for additional compensation therefor in the amount of $14,822.18 and was paid in that amount by change order No. 7 on September 30, 1944. The change order was accepted by plaintiff without protest. In this change order the costs to plaintiff were itemized and the additional amount of lumber used was noted. The change order also credited plaintiff with the additional lumber used.

Any delay occasioned to plaintiff's construction work due to the unavailability of lumber was by reason of its failure to request the lumber sufficiently in advance to permit defendant to fabricate the required sizes from larger pieces. Some of this fabrication was done by plaintiff and change order No. 7 allowed full compensation for all extra work and all expenses in connection with it. The relative priority for the entire project was high, but the priority assigned the housing construction was only AA–2X and not sufficiently high to have first call on lumber supplies available. Defendant exercised due care and diligence in securing lumber for the project and the unavailability of the proper sizes, lengths and kind of lumber for the housing project at all times was not due to any fault and negligence of defendant.

The specifications relating to the stockpiling of lumber and delays by reason of failure to deliver materials to be furnished by the Government provide as follows:

> 2–04 *Materials Furnished by the Government:*
> *a.* Lumber in grades indicated in the Form of Bid has been or will be procured by the Contracting Officer, and will be stockpiled for the use of the Contractor at the site. Each bidder will submit with his bid a statement of his lumber requirements for each type of building. Lumber up to the amount stated in the successful bidder's proposal will be issued to him without charge at the above designated stockpile. Transportation and handling charges thereafter will be at the expense of the Contractor. Lumber required by the Contractor in excess of that issued from stockpile or for items not listed is to be furnished by him at his own expense. For purpose of evaluating and comparing bids, prices indicated in the tabulation included in the Form of Bid will be used. The value of the lumber, thus computed, will not become a part of the contract consideration.
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> 2–05 *Commencement, Prosecution, and Completion:*
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> * * * * *
>
> *c.* If the completion of the undertaking to be performed under the terms of this contract be delayed by reason of delay in delivery of materials, equipment, or supplies to be furnished by the Government and which are essential to such performance, such delay shall not constitute basis for any claim against the Government, but the time of performance will be extended for a period equal to such delay.

From the foregoing paragraph 2–05 (c) it is apparent that plaintiff was warned that there might be delays in furnishing material by the Government and, if so, plaintiff's time for completion would be extended but such delay would not constitute the basis for a compensation claim.

The facts show that at the time plaintiff's representatives visited the site, preparatory to filing a bid, several lumberyards were in operation in Oak Ridge. They were being used by the various contractors, both fixed price and cost plus, as a source of lumber furnished by the Government. The record does not show what notice, if any, was taken of such lumberyards by plaintiff's representatives or whether

any inquiry was made by them concerning the source or manner of furnishing lumber to the project under consideration prior to the bid.

On November 18, 1943, the plaintiff was informed by letter that lumber reuirements would be withdrawn from a certain lumberyard and in fact lumber was secured from that yard. However, plaintiff contends that the lumber should have been stockpiled and ready in advance so there would be no delay in securing the lumber as needed.

Because of the magnitude of the project then under construction, it was impossible for the Government to keep on hand all the sizes and quantities required. In order to avoid all possible delays, the Government requested that orders be sent in ahead of time. At all times, if sufficient advance warning was given, lumber was cut to size and available to plaintiff for use on the job. Any delays were due to plaintiff's failure to order lumber in advance. Inasmuch as the contract contains no provision for advance stockpiling, we can find no negligence on the part of the Government in this practice, nor does this constitute a breach of the contract. Plaintiff's claim must therefore fail as to this item.

We then turn to plaintiff's claim for return of amounts withheld on contract settlements and paid to Roane-Anderson Company.[2]

A summary of the facts relative to this claim is as follows. After the project at Oak Ridge got underway, the question of housing workers for the Government's contractors became an acute one. Stone and Webster, acting on behalf of defendant, ran buses as far as 100 miles away to bring in workers. Some of the contractors operated their own transportation system by way of trucks and buses for the same purpose. The Government solved the problem insofar as its own workers and those of its cost-plus-a-fixed-fee contractors were concerned, by the construction of hutments for housing labor and the contruction of restaurants to feed them. The Government's hutments were built by Government funds and operated under a cost-plus-a-fixed-fee type contract with Roane-Anderson Company. The hutments consisted of 16′ x 16′ plywood buildings to which

[2] The claim for return of charges paid by plaintiff for the housing of its employees by defendant was set out as one of the exceptions to the release.

a minimum of five and a maximum of eight men were assigned to each. Ten or 12 of such units were grouped around a central bathhouse which had toilets and lavatories and gang showers. In the summer and fall of 1943, complaints were received from the surrounding communities in regard to the sanitation conditions brought about by the labor housing situation off the townsite. Some of the contractors maintained their own camps and others undertook to transport their employees into the site from the surrounding communities. In the summer of 1943 an arrangement was made whereby employees of fixed-price contractors at Oak Ridge could be quartered in the Government's hutments at fees of 60 cents per night per employee, of which 20 cents would be paid by the employee and 40 cents by the employer. Every effort was made to advise all the contractors of this arrangement, and the various contractors did quarter their employees in the hutments under the arrangement.

Coupe Construction established its own labor camp at Norris, Tennessee, a distance of approximately 15 miles each way from the city of Oak Ridge. However, beginning in late January 1944, the camp became inadequate and some of its employees were sent to the Government's hutments for housing at Oak Ridge. Charges of 40 cents per night per employee were assessed against plaintiff for such employees and such charges were deducted from its monthly partial payments beginning with monthly pay estimate No. 5, dated April 22, 1944. The first deduction covered the period from March 11 to April 1, 1944. Deductions were also similarly made for hutment charges on plaintiff's pay estimates Nos. 6, 7, and 8. Itemized bills accordingly were submitted to plaintiff in each instance before the deductions. In each instance plaintiff accepted the deductions and made no protest against such payment until the fall of 1944 after the work was completed and several months after all the housing for its employees had ceased. During the month of June 1944 and thereafter, plaintiff made payments by check for the hutment charges without protest until after the work was completed and accepted. On occasion, plaintiff advised the Roane-Anderson Company in writing that it would no longer be responsible for the hutment charges for certain named individuals. It also advised Roane-

Anderson Company of termination dates of the services of its employees for hutment purposes and named certain other of its employees who were occupying the hutments. It also advised the names of its employees whom it had authorized to use the hutment accommodations. A total of $7,662.40 was deducted from plaintiff's pay estimates to cover the hutment charges of its employees in the Government hutments at the rate of 40 cents per night per employee, and a total of $2,036.80 was paid by check by plaintiff for such hutment charges on the same basis. The record does not show that any specific arrangements were made between plaintiff and Roane-Anderson Company, operating the hutments for the Government, for the housing of plaintiff's employees. However, the basis for the use of the hutments was well known to the contractors at Oak Ridge and to plaintiff.

As early as November 14, 1943, plaintiff had stated in writing that it would be able to house 80 men immediately, but asked the Government to supply housing for its colored labor. The housing arrangement for labor was one of the job conditions, and plaintiff was fully aware of the arrangements and the fact that it was expected to pay 40 cents per night for the housing of each of its employees. It participated in such arrangement by supplying identifications and tickets upon which the employees were admitted to the hutment facilities as its employees. It also cooperated with the hutment operators by giving notice of terminations and lists of employees who would be entitled to stay in the hutment facilities. Employees could gain admittance to the hutments only by request of their employer and by the presentation of the card issued by their employer.

Plaintiff now asserts that it was not obligated to pay for the housing of its employees and there existed no contract between it and defendant for such services. While the record does not show that plaintiff was ever formally advised or that plaintiff ever expressly agreed to pay such charges, certainly its employees did use the facilities furnished by the Government. In the bid form, space was provided for each bidder to specify the amount included for the purpose of housing, feeding, and transporting of labor for the project. The schedule of prices, set out in the contract,

specified "the above contract price includes the cost of all housing, feeding, and transportation of labor for the project." Coupe Construction specified no allowance for housing, feeding, and transportation of labor in its bid, and its representatives were called in and told that the labor situation should be investigated and that the housing, feeding, recruitment and transportation of labor would be the responsibility of the contractor. Under the conditions existing at the time, plaintiff could not have retained any labor without arrangements for housing. This was called to plaintiff's attention and a suggestion made that plaintiff make "on-the-spot" investigation. After plaintiff did make such investigation, it was permitted to raise the bid $30,000 and include that amount for the housing, feeding, and transportation of labor for the project. Thereafter arrangements were made to house plaintiff's employees in the Government hutments at Oak Ridge. Deductions were made from their monthly partial payments beginning with monthly pay estimate No. 5, dated April 22, 1944. At a later date, in response to billing by defendant's agents, plaintiff paid by check $2,036.80 for hutment charges. The deductions were accepted by plaintiff without protest until after the work was completed. Furthermore, a system was worked out whereby plaintiff would advise defendant's agents dates of termination of employment and listing the names of persons who were employees of Coupe Construction. Tickets were issued to plaintiff in blank form, which were in turn filled out and given to the men for presentation to the officer in charge of the hutments. An employee desiring to use the hutment facilities could gain admission only upon specific request by plaintiff and presentation of such ticket.

Therefore, we conclude that the hutment services rendered plaintiff's employees were at the request of plaintiff and, further, that plaintiff was aware of the fact that it would be expected to pay for such services. After this knowledge plaintiff continued to request the services and continued to pay for them. While there was no express agreement to pay, we conclude from the foregoing that a contract is implied, and plaintiff cannot escape liability for the hutment charges. See *Niagara Falls Bridge Commission* v. *United States*, 111 C. Cls. 338.

For the foregoing reasons, plaintiff's petition is dismissed.

Since the hutment claim is for moneys retained by defendant by reason of arrangements outside the construction contract, defendant filed a counterclaim therefor. However, the money in question is still in the hands of defendant, and inasmuch as we have determined that plaintiff has no right thereto, defendant's counterclaim is dismissed.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Currell Vance, and the briefs and argument of counsel, makes findings of fact as follows:

1. On May 12, 1942, plaintiffs, A. L. Coupe Construction Co., A. L. Coupe, and E. G. Barker, joined in a partnership under the firm name of Coupe Construction for the purpose of securing and performing contracts for housing for defendant at Fort Knox, Kentucky. The partnership's principal place of business was listed as Louisville, Kentucky. Plaintiffs E. G. Barker and A. L. Coupe were limited partners with no power of management. The A. L. Coupe Construction Co., a corporation organized under the laws of the State of Kentucky, was the general and managing partner. Mr. A. L. Coupe was president of the A. L. Coupe Construction Co. Later the purpose of the partnership was expanded to include contracts for the construction of buildings and utilities for defendant generally. The plaintiff Citizens Union National Bank of Louisville, Kentucky, lent money to Coupe Construction for use in performing the contract pertinent to this suit and took an assignment of the proceeds of the contract in accordance with permission granted in the contract as security for the loan. At the time of the trial of this case, such loan had been repaid and the assignment cancelled. The Citizens Union National Bank of Louisville now has no interest in this suit.

2. On November 27, 1943, plaintiffs, trading as Coupe Construction, referred to herein as the contractor, accepted a negotiated contract with defendant dated November 16, 1943, to furnish all tools, equipment, labor and materials (ex-

cept that furnished by the Government) and perform all work required for the construction and completion of 500 dwelling units in 125 dwelling buildings at Oak Ridge, Tennessee. More specifically, the construction was of 50 "K"-type houses consisting of 4 dwelling units each; 60 "L"-type houses consisting of 2 dwelling units each; and 15 "N"-type houses consisting of 12 dwelling units each. The total estimated consideration was $1,683,450, based upon plaintiffs' unit bids for each dwelling unit. The contractor was to commence work within five days after notice to proceed and complete all work within 120 days thereafter. Liquidated damages for delay were not prescribed. Notice to proceed was accepted on November 27, 1943, thus establishing the completion date as March 26, 1944. However, the completion date was extended a total of 80 days to June 15, 1944. All the houses constructed under the contract were accepted as complete on August 10, 1944. Defendant gained beneficial occupancy thereof on July 31, 1944. No claim was made to the contractor because of the delay in completion. By changes the total consideration of the contract was increased to $1,831,823.62.

3. The contract was written on standard War Department Construction Contract Form No. 2 and contained the customary articles such as Article 3 on "Changes," Article 4 on "Changed Conditions," Article 9 on "Delays—Damages," and Article 15 on "Disputes." The contract also contained other usual provisions common in Government construction contracts as follows:

> ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the Contractor shall fully cooperate with such other Contractors and carefully fit his own work to that provided under other contracts as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 16 of the contract entitled "Payments to contractor" provided in pertinent part as follows:

> (d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation

of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

The specifications incorporated as part of the contract by Article 1 provided in pertinent part as follows:

1–03 *Contracting Officer:*

*a.* The term, Contracting Officer, as used herein shall be taken to mean the officer who signs the contract, his duly appointed successor or his authorized representative.

*b.* The Stone & Webster Engineering Corporation, Architect-Engineer-Manager, under Contract Number W–7421–eng–119 has been designated as the Construction Manager representative of the Contracting Officer, with full authority to supervise all work to be done under these specifications, and to make all decisions and to take all action in connection therewith except decisions and actions under Articles 3, 4, 9 and 15, of the Contract and any provisions of the specifications supplementary to these Articles.

c. Skidmore, Owings & Merrill and W. Earle Andrews, Architect-Engineer under Contract No. W–7401–eng–69, has been designated as the Architect-Engineer representative of the Contracting Officer, with full authority to inspect construction work for quality and for compliance with Plans and Specifications.

*d.* The Contracting Officer will not be responsible for any oral instructions, and no oral proposals or modifications will be considered.

1–04 *Order of Work:* The work shall be carried on at such places and also in such order of precedence as may be found necessary by the Contracting Officer, and shall be constructed in every part in strict accordance with the drawings and specifications and in exact conformity with all location and limit marks established by the Contracting Officer. * * *

1–09 *Priority Rating:* A priority rating of AA–2X has been assigned to this Project and may be applied, subject to applicable regulations, to the delivery of items that are required by the Contractor.

1–11 *Physical Data:* From inspection made at the site, it is believed that physical conditions are approximately as indicated on the drawings. However, it is presumed that, before submitting his proposal, the Con-

tractor has visited the site and carefully examined the drawings and specifications and has fully informed himself as to all existing conditions and limitations, including all laws, ordinances and regulations affecting the contract or the work, and has included in his proposal all items implied or required to attain the completed conditions contemplated by the contract. The Contractor shall familiarize himself with the features and details of the entire development in so far as they may tie in with, or in any manner concern his work. Failure to conform to this requirement shall not relieve the Contractor of any of the obligations of his contract.

1–12 *Payments:* Payments will be made in accordance with Article 16 of the contract. All partial and final payments shall be subject to deductions for telephone service, temporary use of equipment, any material, service or labor (including taxes, and overhead thereon) furnished by the Government, the Construction Manager, or any other Cost-Plus-Fixed fee Government Prime Contractor for which it is specified or thereafter agreed upon, by the Contractor and the Contracting Officer, that a charge will be made.

1–14 *Organization, Plant, and Progress:*

* * * * *

*d.* The Contractor shall within five (5) days after issuance of notice to proceed, prepare and submit to the Contracting Officer for approval a practicable and feasible schedule showing the order in which the Contractor proposes to carry on the work, the dates on which he will start the several salient features (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate appropriately the percentage of work scheduled for completion at any time. The Contractor shall enter the actual progress at the end of each week and shall immediately deliver to the Contracting Officer three (3) blueprint copies of the same.

1–34 *Interpretation of Specifications:* On all questions relating to the acceptability of materials or equipment, classification of materials, the proper execution of the work, and the interpretation of the specifications, the decision of the Contracting Officer shall be final, subject to appeal, as provided for in Article 9 of the contract.

2–04 *Materials Furnished by the Government:*

*a.* Lumber in grades indicated in the Form of Bid has

been or will be procured by the Contracting Officer, and will be stockpiled for the use of the Contractor at the site. Each bidder will submit with his bid a statement of his lumber requirements for each type of building. Lumber up to the amount stated in the successful bidder's proposal will be issued to him without charge at the above designated stockpile. Transportation and handling charges thereafter will be at the expense of the Contractor. Lumber required by the Contractor in excess of that issued from stockpile or for items not listed is to be furnished by him at his own expense. For purpose of evaluating and comparing bids, prices indicated in the tabulation included in the Form of Bid will be used. The value of the lumber, thus computed, will not become a part of the contract consideration.

* * * * *

*c. Checking Equipment and Material Delivered:* The Contractor shall check the quantity and condition of all equipment and material delivered to him. After the equipment and material has been accepted by the Contractor, he shall be responsible for all damage or shortage of equipment and material furnished by the Government and shall replace all shortages and make all repairs to damaged equipment and material at his own expense in a manner satisfactory to the Contracting Officer.

* * * * *

*e. Ready-Mix Concrete:* The Government will furnish 2,000# ready-mix concrete to the Contractor. Each bidder will submit with his bid a statement of the amount of such concrete he will require for the construction specified. Concrete up to the amount stated in the Contractor's proposal will be furnished him without charge. For the purpose of evaluating and comparing bids the cost of concrete will be used but the value of the concrete thuscomputed will not become a part of the contract consideration. If the Contractor requires concrete in excess of the quantity specified in his proposal, then such concrete shall be furnished to the Contractor by the Government at the cost to the Government, plus 10% charge for handling. The ready-mix concrete will be delivered by truck to a point on an established road nearest to the place of final deposit. That portion of the specifications contained in "Concrete" referring to the composition, testing of aggregates, proportioning, mixing and delivery to the site do not apply under this contract to the concrete furnished by the Government. The speci-

fications for placing, finishing, curing and protecting concrete will remain unchanged.

2–05 *Commencement, Prosecution, and Completion:*

* * * * *

*b.* If the completion of the undertaking to be performed under the terms of this contract be delayed by reason of delay in delivery of materials or supplies essential to such performance because of National Defense Priorities, and without fault or negligence of the Contractor, the time of performance will be extended for a period equal to such delay and subject to appeal as provided in the contract.

*c.* If the completion of the undertaking to be performed under the terms of this contract be delayed by reason of delay in delivery of materials, equipment, or supplies to be furnished by the Government and which are essential to such performance, such delay shall not constitute basis of any claim against the Government but the time of performance will be extended for a period equal to such delay.

2–06 ****Location of Lumber Stockpile:*

* * * * *

*b.* It shall be the responsibility of the Contractor to transport all material, tools and equipment to the jobsite at his own expense. Rail facilities are available to Elza, Tennessee. Certain railroad and road facilities are constructed and will be constructed within the project area. These facilities may be determined on inquiry to the Contracting Officer.

* * * * *

*d.* The Contractor shall visit the site to determine the location of the warehouse for storing certain items of equipment and materials furnished by the Government, and for the location of the lumber stockpile referred to in Paragraph 2-04 hereof.

2–07 *Roads:* All roads will be constructed and maintained by others. However, sewer and water lines and house connections will be constructed at the same time as the work under this specification and the full width of the roadway may not be available at all times or short detrous [detours] may be necessary as directed by the Contracting Officer.

2–09 *Measurement and Payment:*

* * * * *

All partial and final payments shall be subject to deductions for ready mix concrete (in excess of the quantity specified in the Contractor's proposal): tele-

phone service and any other material or service furnished by the Government, for which it is specified or agreed that a charge will be made, but payments will not be subject to deductions for ready-mix concrete (within the quantity specified in the Contractor's proposal), lumber (within the quantities and grades specified in the schedule of "Lumber Quantities"), specified equipment to be installed under this contract, water or electric power, or any other material or service furnished by the Government, for which it is specified or agreed that a charge will not be made.

7–02 *Lumber:* It shall be the responsibility of the Contractor to incorporate in the finished work only such material as will meet the inspection approval of the Contracting Officer regardless whether material is furnished by the Government or the Contractor.

* * * * *

**4.** Nine change orders were issued during performance of the contract, resulting in adjustments of the amount of consideration and the amount of time allowed for completion of the work.

**5.** An invitation to bid was sent to plaintiffs about October 27 or 28, 1943, and their bid was filed on November 9, 1943. Before their bid was submitted, an employee was sent to Oak Ridge, Tennessee, to look over the site and report thereon. Plaintiffs' bid was predicated upon their experience in previous construction work principally in the State of Kentucky where similar work had been performed during the summer of 1942 at Fort Knox. At the time the employee of Coupe Construction visited the site in the early part of November 1943, he was shown a hilly section of general farmland and woodland on which was an old farmhouse and an orchard. Some of it was under cultivation, some in grass, and some in woodland. No roads had been constructed in the area. The representative was told that roads would be constructed by others, and that lumber would be provided by the Government and would be available as needed.

**6.** Oak Ridge consisted of approximately 60,000 acres, 18 to 20 miles long, and 47 miles wide, and was located approximately 7 road miles from Clinton, Tennessee, and about 25 miles north of Knoxville. The whole 60,000 acres belonged to the Government and was under the control of the War Department's Manhattan District formed to develop the

atomic bomb. The Government constructed and operated the project largely through four management type contractors, supervising approximately twenty construction prime contractors. The town of Oak Ridge was operated for the Government under a cost-plus-a-fixed-fee arrangement by the Roane-Anderson Company. At the time the contract was let to Coupe Construction, the Government had under construction a total of approximately 3,500 dwelling units, plus related facilities such as schools, stores, restaurants, a small central shopping section, and the town proper, as well as the facilities for manufacture of the atomic bomb. There were approximately 36,000 employees of the contractors to be housed and fed in the community. Because the large number of employees overtaxed the housing facilities and particularly the sanitary facilities of the community, the Government constructed hutments for the housing of its own and contractors' employees under the management of a cost-plus-a-fixed-fee contractor. However, a few contractors constructed their own camps for housing employees. The demand for immediate increase in the housing facilities for workmen at Oak Ridge was such that orders were increased for additional facilities from higher authority faster than contracts therefor could be let by the contracting officer. This unusual activity to construct plants and housing facilities taxed the local roads and available supplies to the extent where it was extremely difficult for the Government at all times to construct and maintain roads in good condition and to furnish materials as needed by the contractors. The town of Oak Ridge was built from farm and woodland to the fifth city in size in Tennessee from 1943 to 1945. The peak of the construction period occurred during the period in which plaintiffs' contract was performed.

7. Bids for construction of the 500 dwelling units involved in the contract pertinent to this suit were received from seven bidders. The bids were opened on November 9, 1943, and Coupe Construction was found to be the lowest bidder. Thereafter on November 16, 1943, defendant issued to plaintiffs a letter contract for the construction of the work in accordance with the specifications which were incorporated by reference into the letter contract. It was also specified that the letter contract would be supplemented by the exe-

cution of a more formal contract on standard form. This letter contract was accepted by plaintiffs on November 27, 1943. This letter contract had attached and incorporated therein a schedule of prices which were specified as including "the cost of housing, feeding, and transportation of labor for the project." These prices were those set out in plaintiffs' bid. There was also attached a schedule of quantities showing the quantity of lumber to be furnished by the Government for the completion of the houses as set out in plaintiffs' estimate in their bid, and a quantity of ready-mix concrete also to be furnished by the Government in the quantity estimated in plaintiffs' bid.

**8. After plaintiffs received the letter contract, Mr. A. L.** Coupe, one of the partners and president of Coupe Construction Company, the general and managing partner, went to Oak Ridge about November 18, 1943. After his arrival, a conference was had by Mr. Coupe and other representatives of plaintiffs, and representatives of Stone & Webster, managing contractor, and of the contracting officer. At that time, some doubt was expressed by Mr. Coupe that the construction could be completed within the contract time of 120 days. Also at that time, Mr. Coupe was asked whether plaintiffs' bid contained any amount for the housing, feeding, and transportation of labor for the project and Mr. Coupe stated that it did not. The bid submitted by plaintiffs did not show any amount for this purpose. Mr. Coupe was then told by a representative of the contracting officer that it would be advisable for him to take some time and investigate the local situation thoroughly by inquiring from other contractors already on the project as to the labor situation. Mr. Coupe then went out and talked with other contractors and investigated the labor situation more thoroughly and reported back to defendant's representatives in a subsequent conference approximately two days later. At that time, plaintiffs were allowed to increase their bid by adding $30,000 for the cost of housing, feeding, and transportation of labor for the project. Mr. Coupe then expressed further doubt that the project could be completed within 120 days. Although the letter contract was not formally accepted by plaintiffs until November 27, 1943, their forces of workmen had been engaged in work on the project

by gathering material and workmen and constructing an office and warehouse for their own forces.

9. During the progress of the work, changes were made from time to time by the use of construction memoranda issued by the contracting officer upon the recommendation of Stone & Webster, the managing engineer, or Skidmore, Owings & Merrill, the architect. Based upon claims submitted by plaintiffs, change orders were issued from time to time to cover any additional increase or decrease in the amount of the contract because of such changes as set out in the construction memoranda. In all, nine change orders were issued increasing the contract a net amount of $111,726.02 and extending the contract time by a total of 80 days. In each instance, plaintiffs accepted the change order with the stipulation that all other terms and conditions of the contract should remain the same. Change Order No. 2, issued April 13, 1944, allowed an increase of 35 days to April 30, 1944, for the completion of the contract. While the change order did not specify the reasons for such extension, a letter written by plaintiffs on April 7, 1944, requested an extension of 45 days for the completion of the contract for five reasons: 30 days were requested because of changes set out in construction memorandum No. 1 which changed the millwork as well as masonry walls; 10 days were requested because of additional masonry work required for foundations; 5 days were requested because of minor changes set out in 17 different construction memoranda which were alleged to have caused minor delays totalling 5 days. Plaintiffs also set out as cause of delay, for which no specific days were requested, delay due to extreme difficulty in manning the job in the beginning due to the fact that men did not care to leave their homes prior to or during the Christmas holidays and because recruiting of labor showed practically no results until after January 1, 1944. The further minor causes of delay were listed as road conditions, utility operations within the site, misinterpretation of specifications which required clarification and alteration to meet requirements. Notations on the letter by Captain B. L. Manx, a representative of the contracting officer, now deceased, indicate that the requests for extension of time were approved to the extent of 35 days and it is apparent that Change

Order No. 2 was issued accordingly. Change Order No. 6, issued July 31, 1944, granted an additional amount of 15 days to April 15, 1944, to complete the contract due to various changes ordered and compensated for by that change order. Change Order No. 7, issued September 30, 1944, granted 10 days' additional time, also due to changes ordered and covered by that change order. Change Order No. 9, issued September 19, 1944, extended the time for completion 20 additional days due to delays caused by reglazing and resetting of window sashes by a subcontractor, Campbell Coal Company. Such sashes had been delivered and, in some instances, installed before the putty had dried. The record shows that some delays were caused by unusual weather conditions, and by the contractor's failure to secure enough experienced workmen to man the job.

The amounts and time extensions in the change orders were usually based upon requests submitted by plaintiffs. Such amounts usually included four percent additional for labor insurance, ten percent for overhead, and ten percent for profit, plus ten percent for profit for the general contractor wherever the work was to be done by a subcontractor.

Change Order No. 7 included the amount of $14,822.18 as an allowance to plaintiffs because the contractor had installed a sizable quantity of inferior grade lumber furnished by defendant. In many instances, such lumber was installed and had to be taken out and replaced. In other instances it was necessary to rework the lumber furnished so as to eliminate defects, and in many instances to resaw 2″ x 4″s from 2″ x 8″s or 2″ x 12″s. Plaintiffs' request for an additional allowance of 108,622 FBM of lumber because of wastage was also allowed. Plaintiffs' compensation included increased cost of labor for applying the beveled siding, cost of removing and replacing lumber, cost of hauling and distributing, cost of clean up and hauling waste, resawing, cost of picking up the lumber at the saw and distributing it, plus four percent for Social Security, ten percent for overhead, and ten percent for profit.

**10.** After the completion of the contract and during the latter part of 1944, plaintiffs filed claims with Stone & Webster Engineering Corporation, architect-engineer-manager for the Government, for additional compensation.

These claims were denied by Stone & Webster on January 2, 1945. By letter dated March 5, 1945, plaintiffs reasserted ten claims to Stone & Webster, as follows:

*Re: Contract W-7421-Eng-4*

In reply to your letters of January 2, 1945, in which you disallowed numerous claims for additional compensation, we wish to state that we again submit the claims enumerated below and we request that any part of the claims which you cannot see your way clear to pass, that prior to your rejection, the matter be referred to conference with the District or Area Engineer, yourselves and representatives of our company:

| *Item No.* | *Brief Description* | *Amount of Claim* |
|---|---|---|
| 1. | Furnishing and installing quarter round around heater ducts on 110 K & L houses, plus additional cost on account of blocking for quarter round and increase in lumber allotment at no charge to us in amount 4,000 FBM | $2,244.04 |
| 2. | Furnishing and installing quarter round in all vertical angles in K, L & N Houses—150,000 lineal feet | 13,125.00 |
| 3. | Furnishing and installing quarter round in all angles of coal rooms—9,000 lineal feet | 787.50 |
| 4. | Furnishing and installing 1½" x 6" casing on either side of porch columns on N type houses | 608.53 |
| 5. | Additional cost on account of blocking electric outlets—5,960 sets of blocking @ 25¢ each and lumber allotment of 4,000 FBM at no charge | 1,490.00 |
| 6. | Additional lumber cost on account of change in grade | 2,706.65 |
| 7. | Credit due on lumber billing | 1,423.67 |
| 8. | Additional costs incurred in transporting and handling lumber requirements | 15,708.41 |
| 9. | Credit for hutment charges—amounts withheld on contract settlements and paid to Roane-Anderson Company | 9,699.20 |
| 10. | Additional costs due to overhead costs incurred by delays caused by changes in details, construction and shortage of Government supplied material | 24,750.00 |
| | Total | 72,543.00 |

**11.** On March 17, 1945, a voucher in the amount of $72,437.16 covering monthly pay estimate No. 10 marked "final" under the contract was sent to plaintiffs with the request that the certificate of the payee be executed along with the release approved by the Under Secretary of War and returned to defendant in order that the voucher might be placed in line for prompt payment. Previously, representatives of Stone & Webster had sent to plaintiffs a copy of a release for execution with the statement that final pay esti-

mate was being prepared and that the release would be required in connection therewith. On March 24, 1945, plaintiffs executed the release requested by defendant. It was signed Coupe Construction by A. L. Coupe, partner. The partnership was then being conducted by the general partner Coupe Construction Company in the name of "Coupe Construction" and Mr. A. L. Coupe was then president of Coupe Construction Company. The release was transmitted to defendant along with pay estimate No. 10, and payment was made thereon in the amount of $72,437.16 on April 2, 1945. No amount was withheld on this estimate as retained percentage or for the purpose of keeping the contract open. The release was in pertinent part as follows:

RELEASE

Approved by the Under Secretary of War March 22, 1941

The work under contract number W-7421-Eng-4 dated 11-16-43 between the United States of America, represented by E. H. Marsden, Col., Corps of Engineers, as Contracting Officer, and the undersigned contractor, having been completed and finally accepted, the United States, its officers and agents, are hereby released from all claims and demands whatsoever arising under or by virtue of said contract, except as follows:

See list attached.

Executed this 24th day of March, 1945.

COUPE CONSTRUCTION,
(Contractor)

By A. L. Coupe [s]
(Official Title)

*Partner.*

* * * * *

The list attached was as follows:

| *Item No.* | *Brief Description* | *Amount of Claim* |
|---|---|---|
| 1. | Furnishing and installing quarter round around heater ducts on 110 K & L houses, plus additional cost on account of blocking for quarter round and increase in lumber allotment at no charge to us in amount 4,000 FBM | $2,244.04 |
| 2. | Furnishing and installing quarter round in all vertical angles in K, L & N houses—150,000 lin. ft. | 13,125.00 |
| 3. | Furnishing and installing quarter round in all angles of coal rooms—9,000 lineal feet | 787.50 |
| 4. | Furnishing and installing 1½" x 6" casing on either side of porch columns on N type houses | 608.53 |
| 5. | Additional cost on account of blocking electric outlets—5,960 sets of blocking @ 25¢ each and lumber allotment of 4,000 FBM at no charge | 1,490.00 |

| Item No. | Brief Description | Amount of Claim |
|---|---|---|
| 6. | Additional lumber cost on account of change in grade | 2, 706. 65 |
| 7. | Credit due on lumber billing | 1, 423. 67 |
| 8. | Additional costs incurred in transporting and handling lumber requirements | 15, 708. 41 |
| 9. | Credit for hutment charges—amounts withheld on contract settlements and paid to Roane-Anderson Co | 9, 699. 20 |
| 10. | Additional costs due to overhead costs incurred by delays caused by changes in details, construction and shortage of Government supplied material | 24, 750. 00 |
| | Total | 72, 543. 00 |

See our claim to Stone & Webster Engineering Corporation dated March 5, 1945.

12. On June 6, 1945, the contracting officer allowed the claims in Items 4, 5, and 6 as set out in the exceptions to the release, and made payment thereon in the amount of $5,277.89. The remaining excepted claims were denied. On June 30, 1945, plaintiffs filed an appeal to the head of the department from the decision of the contracting officer. The War Department Board of Contract Appeals heard plaintiffs' claim on Items 1, 2, 3, 7, 8, 9, and 10 of the exceptions to the release and issued its decision on October 6, 1950. The appeal was sustained in plaintiffs' claims on Items 1, 2, and 3, and payments have been made thereon totalling $16,156.54. Claims set out in Items 7, 8, and 10 of the exceptions to the release were denied by the War Department Board of Contract Appeals, but the claim on Item 9 was allowed to the extent that it was found that charges for hutments were not made pursuant to any provision of the contract and if any agreement existed between the parties for charges concerning housing of plaintiffs' employees by the Government, such was outside the terms of the present contract and therefore any claim thereon was not properly before the Board for consideration. The Board stated: "Without passing on the propriety of the Government's claim for payment, it is sufficient to say that the withholding is unauthorized under the terms of the present contract, and this item of the claim is therefore sustained." The Board denied plaintiffs' claim set out as Item 7 as an exception to the release on the grounds that the invitation to bid was not an offer to sell lumber to plaintiffs at the prices there stated, but that such prices were merely for use in evaluating bids.

The claim set out in Item 8 to the exceptions to the release was denied on the grounds that the terms of the contract provided for extensions of time but not for damages for delays in the delivery of materials, equipment or supplies to be furnished by the Government. The claim set out in Item 10 to the exceptions to the release was denied by the War Department Board of Contract Appeals on the ground that plaintiffs had failed to establish proof of any basis for the claim. The board observed that the record before it showed that each change order allowed additional sums based upon amounts requested by the contractor, or amounts arrived at after negotiations and there was included in such amounts items of 10 percent for overhead and 10 percent on top of that for profit, and further, that the record showed no reservation of additional claims in connection with overhead.

**13.** It is plaintiffs' strenuous insistence that the release hereinabove referred to is a nullity because it was not signed by the general partner Coupe Construction Co., Inc., but rather by A. L. Coupe, one of the limited partners. It is true that by the laws of Kentucky, under which the partnership was formed, and by the articles of partnership, the limited partners were without authority to sign for the partnership, and such authority was vested only in the general partner.

On the other hand, A. L. Coupe was not only one of the limited partners but was president of the general partner, the corporation, and as such was the individual in practical control of the partnership operations. Not only so, but the record discloses that it was almost the uniform practice of the partnership in signing various documents, including acceptance of change orders, to disregard the stated requirement and omit the designation of the corporation general partner as signatory thereto.

**14.** Plaintiffs' claims in this suit may be outlined by reference to their counsel's opening statement, as follows:

> The big, essential point of our claim, sir, is that the government failed to stockpile the lumber in a single site. That is the first breach which we claim.
>
> The second breach is that the government failed to have the lumber there and to issue it to us as needed for the construction work. It is our contention that the lumber under the contract should have been issued as

needed for the construction work so that the construction could go along in an orderly course, economically and in sequence rather than just haphazardly.

In addition, the government, not only failed to have the lumber available, but in an effort to do something with the high priority character of the project it issued to us all kinds and sizes and shapes of lumber different from those specified in the contract and different from those which it was obligated to furnish to us.

The result was that these sizes and shapes involved additional labor costs and costs of handling. That, I think, was the lumber portion of the claim.

Now, with respect to roads; it was represented to us that the roads would be down in time for construction work to proceed. The difficulty was that with the confusion and urgency of the project they simply were not done in time, which further increased the cost of handling rough lumber and also caused certain damage with respect to broken axles on the trucks and repairs and servicing of the trucks.

Then, the third item of damage which we have and for which we claim the government breached the contract is that the contract obligates the contractor to furnish all the labor necessary to build the houses and to do the work. There is nothing in the contract of any restriction or interference with the contractor's recruiting of labor, yet, after the job had been started, Mr. Coupe and the whole project had a rather rough surprise, shall I say, in the sense that they were suddenly told that they could not recruit labor when and where they wished, but they could only recruit labor in certain places and at certain times, according to the ideas of the Director of War Manpower Commission in the area.

We shall show that the practice was for the War Manpower Commission either to write letters or to issue orders by telephone in which it would be stated that recruiting could only be done in certain places.

We shall further show that it was Mr. Coupe's plan to recruit a large proportion of competent labor in Kentucky, where his organization is well known, and where certain skilled craftsmen were well known to his organization, but that the War Manpower Commission prevented him from being able to recruit labor there and also from being able to recruit and provide labor which he ordinarily would have done in the course of discharging his obligation under the contract.

Then, there is the claim for hutments. So, I think they may be described as four claims altogether and that I think is a general statement of our claim here today, sir.

**15. Plaintiffs had had previous experience in the construction** of multiple unit housing projects, and had in such work used the assembly line plan of construction. In such method a central fabricating plant is set up where all lumber is sorted and cut to sizes and distributed to the various units in such sequence that individual crews can proceed from one unit to the next, performing on each unit the same item of construction and thus increasing their efficiency in such performance.

Plaintiffs had planned to adopt this assembly line system in performing the instant contract. They had understood from the provisions of the specifications, from the letter to them of B. F. Hall, Division 4 Superintendent, of November 18, 1943, and from conversation with Government officials at the site that all their lumber requirements would be stockpiled at one lumberyard and that it would be possible for them to set up a central fabricating plant at such yard. Plaintiffs did not discuss with the Government officials in advance of acceptance of the contract such plan of procedure, and were unable to put it into practice at any of the Government lumberyards because such yards were not for the exclusive use of any one contractor, but for the use of contractors on various Government jobs.

In this situation plaintiffs did not set up a central fabricating plant in their own area, but brought to the project several portable saws which they moved about from place to place as the work progressed.

**16. At the time plaintiffs' representative visited the site,** preparatory to filing a bid, several lumberyards were in operation in Oak Ridge. They were then being used by the various contractors, both fixed price and cost plus, as a source of lumber furnished by the Government. The record does not show what notice, if any, was taken of such lumberyards by plaintiffs' representative or whether any inquiry was made by him concerning the source or manner of furnishing lumber to the project under consideration prior to the bid.

**17. On approximately November 20, 1943, after plaintiffs** had received the letter contract, but before their acceptance

of it, a small lumberyard then being used as the lumberyard for Townsite No. 3 by other contractors, under the jurisdiction of Stone & Webster, was pointed out to plaintiffs' representative by employees of Stone & Webster as the yard from which lumber would be secured for the construction of the housing project. On November 18, 1943, Mr. Hall, a representative of Stone & Webster, wrote the contractor that the lumber requirements would be withdrawn from Townsite Lumberyard No. 3, and set out certain procedures to be followed in handling lumber, including a requirement that requisitions be made for lumber needed in ample time to permit the material men to verify the lumber as available. The letter further stated, "It is intended that such quantities of lumber as requested will be available, but in case a deficiency in some item is anticipated by you, contact Mr. Morgan, Divison 4."

**18. The Manhattan District** placed its requests with the Corps of Engineers who centrally procured lumber. Set forth in the requests would be the quantities, general sizes, and species of lumber. The Corps of Engineers would then place orders for the lumber as requested. However, sometimes the mills became late in their shipment schedules and Stone & Webster Engineering Corporation then was authorized, through their procurement division, to make open market purchases from distribution yards and from retail yards anywhere in the United States from coast to coast. In such case, a higher rate was paid by the United States, but not by the contractor, than if the lumber was procured from the central lumberyard. In addition to this, the townsite was heavily wooded and Stone & Webster set up a sawmill at which was processed all merchantable timber that was cut from the clearing operations. That lumber was used in the construction of the project. In addition, Stone & Webster had authority to take larger pieces of lumber when necessary and cut them down into smaller sizes when required. For example, 2″ x 4″s would sometimes be ripped out of 2″ x 8″s. In addition, in the early summer of 1944 an ore dock had been taken down in the Mesabe Range and it had about 5,000,000 board-feet of lumber in it, big timbers of unusual sizes which were shipped to the project and then cut to usable lengths. It was always hard to get lumber

in adequate quantities, but the procurement policies and the organizations in question made it possible within a few hours to get lumber somewhere in the area when urgent. Length was a problem because regardless of how it was ordered the lumber arrived in random lengths. The major part of the lumber procured for the job had a very high moisture content and had not been air-dried. Seasoned lumber was requisitioned, but it was unobtainable.

The 4,242,800 board-feet of lumber handled by plaintiffs in the course of their construction contract was approximately five percent of the total amount of board-feet of lumber handled in the Oak Ridge project during the same period.

The lumberyards at Oak Ridge were probably the largest in the Nation at the time. At one time there were 10,000,000 board-feet of lumber on hand.

Coupe Construction did use Townsite 3 Lumberyard to an extent, but it was necessary for them to procure lumber from other yards in the area also.

The lumber supply was never depleted on the project. There was quite a bit of lumber in the yards at all times. There were times, however, when the needed sizes, shapes and lengths were not present and centers were put up by Stone & Webster for processing lumber into smaller sizes.

The lumber came in varying sizes, necessitating, in some cases, giving a larger length than that requested. However, in this eventuality, a charge was made for the length requested and not for the longer length necessitated by the miscellaneous selection of lumber sizes.

The lumber which was sometimes furnished in lengths longer than that required or ordered by the contractor did not cause any inconvenience or extra effort for the reason that even when lumber came designated at the proper size, it would still be necessary to square the ends by cutting off a small amount. In this operation it would be no more difficult to cut off two feet than two inches. Consequently, the contractor was in no way delayed by having to handle pieces of lumber in lengths slightly in excess of those which were ordered.

Generally, the lumber orders were filled promptly. Only one specific delay was shown which was as long as one day, when it was impossible to get lumber of a tongue and groove

variety for roofing. In this case, some square edge lumber was provided.

**19. Every effort was made to provide the contractor with** lumber under very trying circumstances. The first order was to deliver the product at a given time so that cost was not the most important item. There was no hesitancy on anyone's part to saw a 2" x 8" to get two 2" x 4"'s just because it would cost more. For off standard materials, revisions were made in modification order No. 7 to make adjustment for them.

The operation of the lumberyards was so organized that if from a study of the requisitions it appeared to the material man that he was running low on a particular type of lumber, he could order additional supplies from the central lumberyard in order to maintain his supplies. It was requested that orders be sent in ahead of time to facilitate their being filled when the driver arrived with the truck. If it was impossible to fill the order when the driver arrived, he would be given whatever they had in the lumberyard at the particular time.

At all times, if sufficient advanced warning was given of lumber requirements, Townsite Lumberyard No. 3 could cut lumber in order to fill a requisition, if the proper sizes of lumber were not available.

It is a poor construction practice to expect to be able to send a driver down to a yard and immediately come up with the size of lumber required. A good practice requires placing of orders sufficiently in advance to facilitate their being filled on schedule. Sometimes the contractor did this, but at other times trucks were sent down expecting orders to be filled immediately without proper advance warning. This faulty procedure was at times responsible for any delays the contractor had in the receipt of lumber.

**20.** The contractor never requested permission to set up a central fabricating plant at any of the Government lumberyards. If such permission had been requested it would have been denied because of the practical impossibility of allowing all contractors to fabricate at the lumberyard. The arrangement was that each contractor had his own area in which he could perform fabricating operations if he so desired. As far as setting up a fabricating plant at a con-

tractor's headquarters was concerned, it would not have been necessary to have permission from anyone to do so. Many contractors did set up fabricating plants at their own areas and it would have been perfectly possible for plaintiffs to have done so if they had so desired.

No request was made by plaintiffs to set up a central fabricating plant to work the lumber. Nor, during the course of the job, did plaintiffs complain that lumber was not being stored properly for them.

**21.** After the construction work was completed and on August 31, 1944, plaintiffs submitted to defendant a claim for additional compensation totaling $14,822.18, including four percent for Social Security, etc., ten percent for overhead and ten percent for profit, to cover the increased cost of hauling, handling, removing and replacing the defective lumber and the lumber of improper sizes furnished by defendant. This letter was as follows:

> We itemize below our request for additional compensation in the amount of Fourteen Thousand Eight Hundred Twenty-Two Dollars and Eighteen Cents ($14,822.18), for expense incurred in handling inferior grade siding and varying size 2 x 4's:
>
> | | |
> |---|---|
> | 1. Increased labor cost for applying 399,988 FBM bevel siding @ $15.00 | $5,999.82 |
> | 2. Carpenter hours required to remove, replace and putty after application 1900 hrs. @ $1.45 | 2,755.00 |
> | 3. Haul and distribute 108,622 FBM @ $5.00 | $543.11 |
> | 4. Clean-up and haul waste 108,622 FBM @ $7.50 | 814.67 |
> | 5. Resawing 196,000 FBM of 2 x 4's to uniform width @ $3.50 per M | 686.00 |
> | 6. Pick up at saw and distribute 196,000 FBM of 2 x 4's @ $5.00 per M | 980.00 |
> | 4% Social Security, etc | 471.14 |
> | | 12,249.74 |
> | 10% Overhead | 1,224.97 |
> | | 13,474.71 |
> | 10% Profit | 1,347.47 |
> | Total | 14,822.18 |

The above expenses were incurred due to the fact that siding supplied was of inferior grade and workmanship, in addition to being very green, causing us to cut out knots, shakes, warps, splits, cups and manufacturing defects, thereby causing us to use 108,622 FBM of additional siding to complete our contract, thus in connection with the above, our lumber allotment should be increased 108,622 FBM of siding at no cost to us.

After the siding was applied and was in apparently acceptable condition, there was buckling, shrinking and cracking causing rejection which forced us to replace the rejected siding. On January 12, 1944, we notified Division No. 4 by memorandum that this condition would arise and we should not be held liable.

As regards the 2 x 4's, approximately 75% of all alloted us for construction of our contract was resawn from 2 x 8's, 2 x 12's and 4" material, thus we received varying widths causing us to rip them to a uniform width.

Trusting the above will be approved and formal change order forwarded for our signature in the near future, we remain,

Respectfully,

COUPE CONSTRUCTION,
C. W. Mueller /s/
C. W. MUELLER,
*Project Manager.*

On September 30, 1944, change order No. 7 was issued and accepted by plaintiffs without protest. It allowed the claim in the amount requested for culling, sorting and reworking inferior grade lumber furnished by the Government. The lumber allotment was also increased by 108,622 FBM as requested. No appeal was filed from that change order.

**22.** The record shows that plaintiffs were delayed to an undetermined degree because of the failure of defendant to supply lumber. Lumber was usually available at Oak Ridge for all contractors including plaintiffs. However, it was necessary to fabricate some smaller sizes from the larger pieces at times. Most of such fabrication was done by Stone & Webster upon request of the contractors but some was so reworked by plaintiffs. Change Order No. 7 was allowed as compensation in full for such extra work and for all expenses in connection with it.

**23.** The unavailability of the proper size, length and kind of lumber for the housing project at all times was not due to any fault and negligence of defendant.

**24. While the relative priority for the project was high, the priority assigned the housing construction was only AA–2X and not sufficiently high to have first call on lumber supplies.**

ROADS

**25. The roads were not completed in the vicinity of K, L, and N housing area at the time bids were requested in October 1943. Neither were the utilities completed in that area. This was apparent and could be ascertained by inspecting the site. Before entering into the contract the contractor had actual knowledge of these existing conditions.**

**26. There were heavy rains at Oak Ridge during the winter beginning December 1943, and lasting through April 1944. At times during this period the rains were unusually heavy. During part of this period it was so wet that it was impossible to work on the roads or keep them in good repair.**

The main cause of the poor road conditions was the red clay in the general area, which became very slippery when the weather was wet, clinging to the wheels of the trucks and forcing itself in between the dual wheels on the heavier units. When the trucks returned from dirt roads to the gravel and asphalt roads, the red clay was thrown off on to the roads, necessitating removal of the clay. All the contractors in the area, including Coupe Construction, contributed to the general condition of the roads and all suffered the effects thereof.

Stone & Webster had responsibility for maintaining all of the roads in the center of the project and they operated motor patrols (in the lumberyards) and added stone to maintain established roads. Scrapers were used to clean mud off the roads and dump more gravel on to them in order to keep them in usable condition. A constant program was maintained to keep the roads in as good condition as physical conditions would permit.

In accordance with provision 2–07 of the contract specifications, sewers, water lines and house connections were constructed at the same time as were the buildings. Every effort was made through the medium of weekly conferences to prevent the housing contractor and the utility contractor from getting in each other's way. This was done by meetings with the Government representative from Stone &

Webster, Coupe Construction, and the utility contractor. Procedures were set up whereby the housing contractor would work the houses on one side of the road while the utility contractor would put trenches in on the other side.

The extra costs attributable to bad roads are "a matter purely of opinion." It is impossible to tell what the contributory damage was. Whatever damage did result was caused by physical conditions in the area, i. e., red clay, hills, and rain, to the operations of the utility contractors installing utilities currently with the housing construction, and to the fact that all work on roads had not been completed before plaintiffs' operations.

LABOR

**27. After the opening of the bids, plaintiffs'** representatives met with the representatives of the contracting officer. At this conference it was pointed out to Mr. Coupe that under the contract the housing, feeding, recruitment, and transportation of labor was the contractor's responsibility and Mr. Coupe was specifically asked if he was fully aware of the difficulties in taking care of men and getting men. It was further suggested that he spend some time looking over the job and talking to other contractors on the job in order to satisfy himself that he had enough money in his bid to take care of the situation. Defendant made full disclosure to plaintiffs of all the conditions in the area at the time because of the desire not to take unfair advantage of the contractor and the wish to insure full performance of the contract. Mr. Coupe stated that he would spend whatever time he thought necessary looking over the job and talking to other contractors, particularly with respect to the problems in securing labor and the housing and feeding of labor.

**28. Three days later Mr. Coupe had completed his investi**gation of conditions, particularly labor conditions, in the area by talking with other contractors. On the basis of these discussions with other contractors, plaintiffs concluded that they had not made adequate allowance for hiring, housing, feeding, and transporting labor in their bid and requested permission to increase their bid by $30,000. A letter confirming this agreement was signed on November 14, 1943.

by C. W. Mueller, vice president of Coupe Construction Company.

**29.** Recruitment of labor in the area was under the direction of the War Manpower Commission, Region 7. In order to recruit within any area it was necessary for the local manager to request permission of the state director of the War Manpower Commission to go into that area to recruit labor. Because of the difficulty in securing labor and the multiple recruiting for the same positions at the same time among contractors on the job, an agreement between Stone & Webster Corporation, J. A. Jones Corporation, and Roane-Anderson Company was established to assist all the various contractors, including Coupe Construction, in securing adequate and necessary labor. This recruitment was also done on itineraries from the War Manpower Commission. Under this procedure, laborers were recruited for Coupe Construction who paid all the necessary charges incident to this method of recruitment such as advancing money for meals, etc. The War Manpower Commission declared that some areas were critical areas where recruitment was not allowed. One such area was Louisville, Kentucky. Recruiting of labor for the Oak Ridge project was also done by the carpenters' unions who sent requests for carpenters all over the country.

**30.** The labor turnover in the area was very high. The reason for the high turnover was that employment was plentiful all over the country, many of the laborers were not construction laborers to begin with and many came to the area just for the ride. In addition, living conditions were poor at Oak Ridge at that time. All of these circumstances created a highly competitive market.

**31.** Coupe Construction was behind in its work and gave as a reason that it needed more labor. When any contractor was in distress in that way, more emphasis was put on his labor recruitment and special assistance was rendered. Consequently, if anything, Coupe Construction was given a better treatment than other contractors. In other respects Coupe Construction was treated the same as were other contractors.

Plaintiffs' labor was no better and no worse than that of the other contractors. Coupe's labor difficulties were shared

in common with the other contractors on the job, and resulted from the war effect on the labor situation and the orders of the War Manpower Commission, and on the local living conditions at Oak Ridge.

HUTMENTS

**32.** The housing situation at Oak Ridge was so bad that Stone & Webster and Roane-Anderson Company were operating an off-area bus system that ranged up to a hundred miles one-way, away from the job to bring in workers. Some contractors operated trucks covered with tarpaulins and with benches in them, for many miles from the job site to enable their workers to commute daily.

**33.** The Government-owned labor housing hutments were opened up to fixed-price contractors after complaints were received from surrounding communities in regard to sanitation conditions. In the late summer of 1943 there were too many tents and not enough latrines.

The hutments consisted of a 16-foot by 16-foot prefabricated plywood building to which a minimum of five and a maximum of eight men were assigned. There were 10 to 12 such units grouped around a central bathhouse which had toilets and lavatories and gang showers. Also, trailer camps, which the Housing Administration had transferred to the Manhattan District, were grouped around center bath units with 25 to 50 trailers around a unit. The policy was to provide housing for those people who could not be absorbed by surrounding communities. These hutments were built by Government funds under cost-plus-a-fixed-fee-type contracts.

**34.** Defendant made every effort to advise bidders on contracts at Oak Ridge of the labor situation and suggested that an amount be included in the bid for the purpose of housing, feeding and transporting labor for the project. In the bid form blanks were provided for each bidder to specify the amount included for such purpose. The schedule of prices set out in the contract specified, "The above contract price includes the cost of all housing, feeding, and transportation of labor for the project." Since Coupe Construction specified no allowance for housing, feeding, and transporting labor in its bid, its representatives were called in and told that the labor situation should be investigated and that the hous-

ing, feeding, recruitment and transportation of labor would be the responsibility of the contractor. Coupe Construction's representatives were then given an opportunity to make on-the-spot investigations and to raise their bid to include these labor expenses, even after bidding was closed and Coupe Construction was found to be the lowest bidder. The record shows that every opportunity and assistance possible were given to Coupe Construction to make determinations concerning labor. After such investigation Coupe Construction was allowed to raise their bid $30,000 and include that amount for the housing, feeding and transportation of labor for the project.

**35.** During the summer of 1943 the hutments which had been maintained for employees of cost-plus contractors, were opened up to employees of fixed-price contractors at Oak Ridge. A survey of costs and expenses resulted in fixing hutment fees at 60 cents per night per employee, of which 20 cents would be paid by the employee and 40 cents by the employer. All contractors working on the project were advised of the arrangement at that time. Many of these contractors were still on the project when Coupe Construction arrived on the scene in November 1943, and were available for advice concerning the labor situation at the time the subject was under discussion with defendant's representatives by the contractor.

**36.** The hutments were operated for the Government by Roane-Anderson Company on a cost-plus-a-fixed-fee basis and the hutment charges collected went to the credit of defendant. Any loss due to failure to collect hutment fees was suffered by defendant.

**37.** In the beginning, Coupe Construction housed its own employees in a camp rented for the purpose from the Tennessee Valley Authority at Norris, Tennessee. These employees were transported the approximately 15 miles each way from camp to work and return daily. Beginning in late January 1944, the camp became inadequate and some of plaintiffs' employees were sent to the Government hutments for housing at Oak Ridge. Charges of 40 cents per night per employee were assessed against plaintiffs and deducted from their monthly partial payments, beginning with monthly pay estimate No. 5 dated April 22, 1944, covering the

period from March 11 to April 1, 1944. A bill was sent to plaintiffs on April 20, 1944, for all the employer's part of the hutment charges on their employees accruing to that date. This bill showed that the first charges accrued January 27, 1944. Plaintiffs accepted the deduction and made no protest against such payment until the fall of 1944 after the work was completed and after the employees had been housed for several months. Deductions were also made from each monthly pay estimate for the hutment charges accruing during the period covered by the payment on pay estimates Nos. 6, 7, and 8. Itemized statements were furnished in each instance of deduction. The last deduction occurred on pay estimate No. 8 dated June 27, 1944. Those deductions were likewise accepted by plaintiffs without protest until after the work was completed. From time to time correspondence occurred between plaintiffs and Roane-Anderson Company concerning the housing of individual employees. Plaintiffs, on occasion, advised the Roane-Anderson Company in writing that they would no longer be responsible for the hutment charges of some named individuals. Plaintiffs also advised Roane-Anderson Company of dates of termination of the services of employees for hutment purposes and of the named individuals occupying the hutments who were employees of Coupe Construction. One such letter dated July 14, 1944, stated, "Supplementing our letter of even date, this is to advise that we also authorize the following men, employees of R. L. Dresser, subcontractor, for hutment accommodations * * *." During the month of June 1944, and thereafter, plaintiffs made payments by checks for the hutment charges billed for their employees. There was deducted a total amount of $7,662.40 from plaintiffs' pay estimates to cover the hutment charges for their employees. In response to billing by defendant's agents, plaintiffs paid by check the total amount of $2,036.80 for such hutment charges. These sums represented the 40 cents per man per night which was set up as chargeable against the employer.

38. The general arrangement for housing the employees of fixed-price contractors in the Government-owned hutments was for the employers to certify such employees as they wished to use the hutments to the hutment manager. Records were then kept charging the employer 40 cents per

night per man for those people so referred. Twenty cents per night per man was assessed and collected directly from the employees unless the contractor used a system of payroll deduction to collect such charges for defendant. This arrangement was well known to the contractors and their employees at Oak Ridge during 1944 when plaintiff's employees were housed in the hutments. It was one of the job conditions. On November 14, 1943, plaintiffs wrote Stone & Webster and submitted a list of subcontractors and added:

> We further wish to state, we find housing space for 80 men immediately available at Men's Dormitory and with you supplying housing for the colored labor this will give us ample time to erect additional dormitory space. Temporary cafeteria service is available by John A. Johnson Company, thus we are assured of food and housing for the forces to be placed on the payroll at the start of the project.

39. In order for a contractor's employees to use the hutments for lodging, tickets therefor were issued in blank form to the various construction companies who in turn filled them out and gave them to their men for presentation to the officer in charge of the hutments at the time lodging was sought. A number of these tickets were given to Coupe Construction and issued to their employees over the signature of their timekeeper. These tickets specified the name of the employee and his employer, the employee's badge number, the period of time for which issued, and contained space at the bottom for checks to show the beginning and ending of the hutment services. On the back the tickets issued instructions to the effect that new tickets must be requested each week, and concerning check out conditions. It also stated, "This ticket is your hutment identification and must be available for checkers at all times." An employee of a contractor desiring to use the facilities of the hutments could gain admission only upon specific request of his employer and the presentation of such a card. If an employee did gain admittance to the hutments otherwise than by permission of his employer, he would not have had a bed, blankets, pillow, or sheets available for use. While it was the practice to make these requests for the use of the hutment facilities in writing, under certain circumstances telephone calls from the employer were considered sufficient. When an employee of a

contractor left his employment it was the custom for a letter to be sent to Roane-Anderson Company canceling that employee's sleeping accommodations in the hutment area. After such notification, no further charges would be made against the employer.

While the record does not disclose any specific instance in which plaintiffs were advised of the financial arrangements concerning the housing of their employees in these hutments, such arrangement was common knowledge and came to their attention after bills were first submitted April 20, 1944. Plaintiffs thereafter participated in the arrangements for the housing of their employees at the Government's hutment facilities, accepted deductions from their pay estimates for the charges therefor, and even issued checks in payment of bills submitted. No complaints were made concerning such charges until after the services had been rendered and received and all work on the contract completed.

**40.** From all the proof it is fair to conclude that the hutment services rendered plaintiffs' employees were at the request of plaintiffs with the knowledge that payment by the employer therefor would be required, at the rate of 40 cents per night per man, and that the services so furnished were upon that understanding.

DAMAGES

**41.** As a measure of the damages claimed by plaintiffs in this case they rely upon their calculation of the excess cost per thousand board feet for the handling of lumber under this contract, over such cost per thousand board-feet in a previous multiple housing unit construction project. This excess they have figured at $82.70 per thousand board feet, though in arriving at this figure they have assumed without proof that 330,000 board-feet of gypsum sheathing, purchased and installed by themselves involved no increased costs. This excess cost per thousand board-feet they have applied to the total used. For the reasons stated below such calculations are not reliable.

Plaintiffs also claim an additional sum for labor recruitment. It is believed that the $30,000 by which plaintiffs were allowed to increase their bid is sufficient to offset such increase.

In addition, plaintiffs claim additional costs occasioned by claimed delay of 80 days, amounting to $483.093 per day, or a total of $38,647.50. It is true that extensions of time totaling 80 days were granted to the plaintiffs, but all such extensions were in connection with change orders accepted by plaintiffs without protest or appeal, and generally embodying an allowance for overhead.

**42. The total amount received by plaintiffs for performance under the contract, as amended by change orders and modifications, was $1,831,823.62. The total cost to plaintiffs for performing the contract was $1,906,596.56, thus showing an out-of-pocket loss of $74,772.94.**

**43. It is not possible to determine the exact reasons for the loss within any reasonable degree of accuracy. Some of this loss was occasioned by plaintiffs' underestimating the labor situation and underestimating the cost of performance of a housing contract of this kind, a distance away from their home base and during winter weather, which proved to be severe from the standpoint of excessive rainfall. Some of the loss is chargeable to voluntary payment of extra wages to laborers so that laborers drew the wages of semiskilled workmen, and some to the charges for excess lumber because plaintiffs underestimated the requirement. Other excess costs were occasioned by plaintiffs' unjustified assumptions that a lumber prefabricating plant could be set up at a lumberyard without first verifying the possibility of doing so. Some of the loss was occasioned by plaintiffs' inability to secure competent personnel and some was due to the fact that certain needed lengths and sizes of lumber to be furnished by the Government were not immediately available. Some extra costs were due to the condition of the roads in the housing construction area resulting from their incomplete state, from the operations of other contractors installing the utilities, and the excessive rainfall. Some additional cost was due to the additional time required for the construction resulting from many reasons, including severe winter weather, inability to secure qualified labor as needed, and to the many changes ordered by the Government and included in the various change orders.**

Plaintiffs' basic cost records such as vouchers, bills, canceled checks, etc., were damaged by rats and were destroyed

early in 1952, while this suit was pending but before proof was submitted. The remaining records, including copies of payrolls supplied by defendant, were not kept in a manner to segregate costs of the various phases of the work, such as placing of rough lumber, placing of gypsum siding, placing of the concrete and masonry work, etc. A considerable portion of the work was subcontracted, including certain interior millwork and finishing roofing, some of the hauling, etc. Due to the difficulty in securing labor, plaintiffs classified their common labor in higher categories, such as carpenter tenders, thereby allowing payments of 5 cents per hour extra. This contributed to some of the excess costs. In other classifications of labor, such as foremen and apprentices, labor pushers, essential workers, maids, etc., it was impossible to determine to what phases of the work such were assigned.

Plaintiffs' additional costs due to the road conditions and for poor and scarce labor cannot be separated from other costs.

**44. There was a total of seven bidders on the contract here in issue. These bids in total amounts were as follows:**

| *Name of Bidder* | *Amount of Bid* |
|---|---|
| John W. Ryan Const. Co., Inc | $2,414,000.00 |
| O'Driscoll & Grove, Inc | 2,074,846.95 |
| A. Farnall Blair | 1,939,405.00 |
| Allan J. Saville, Inc | 2,473,195.00 |
| Coupe Construction | 1,653,450.00 |
| William A. Berbusse, Jr | 1,720,000.00 |
| Foster & Creighton Co | 2,155,585.00 |
| Total | 14,490,481.95 |

The average bid was $2,070,068.85. Plaintiffs' bid was $1,653,450, or $416,618.85 under the average. Assuming that these bidders each included 10 percent for profit, the average bid, as reduced by 10 percent, was $1,863,061.96. Plaintiffs' bid as reduced by 10 percent was $1,488,105, or $374,956.96 less than the average bid as reduced by 10 percent. The total cost to plaintiffs was $1,906,596.56. Of this amount, $133,160.45 was added by modifications and change orders 1 through 9, plus allowances of claims after completion, leaving the total cost of performing the original contract as $1,773,436.11. The cost of performance was $89,525.85 less than the average bid reduced by 10 percent.

COUNTERCLAIM

**45.** The hutment charges represented by the 40 cents per man per night charged against the employer and deducted for various monthly pay estimates amounted to a total of $7,662.40. The amount of such charges billed against plaintiffs and paid for by plaintiffs by check amounted to a total of $2,036.80, making a total of $9,699.20. These charges were the subject of one of plaintiff's appeals to the head of the department from the contracting officer's decision. The decision of the Army Board of Contract Appeals, representing the head of the department, was to the effect that the contract did not include any provision for housing plaintiffs' employees for pay from plaintiffs, and that any arrangement therefor would necessarily be outside the terms of plaintiffs' construction contract. Therefore, it was concluded that the board had no authority to withhold such amounts under the terms of the construction contract. However, in issuing the final settlement voucher in payment for other amounts allowed by the Board of Contract Appeals, the amount of the hutment claim was not included. Defendant is now in possession of the moneys involved in plaintiffs' claim on the hutment charges which is the same sum involved in defendant's counterclaim.

The facts concerning the hutment charges are set out above in findings 32 through 40, and are incorporated in these findings on defendant's counterclaim by reference.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that neither the plaintiff nor the defendant is entitled to recover, and both the petition and the counterclaim are dismissed.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 200

A. L. COUPE CONSTRUCTION CO., INC., A. L. COUPE AND E. G. BARKER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims is reported in 139 F. Supp. 61, and is included as an appendix to the petition.

### JURISDICTION

The judgment and opinion of the United States Court of Claims were entered on March 6, 1956. The time for filing a petition for a writ of certiorari was extended by order of the Chief Justice to June 25, 1956, on which day the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioners executed a valid and binding release of all claims arising under their contract except those claims specifically reserved.

2. Whether the government breached its contract with petitioners by failing to stockpile at a single location lumber to be used by them in performing the contract.

3. Whether petitioners entered into an implied-in-fact contract to repay the Government, in part, for the cost of housing petitioners' employees.

CONTRACT PROVISIONS INVOLVED

Article 16(d) of the contract, entitled "Payments to contractor", provides in pertinent part:

> "(d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein."

The specifications of the contract provide in pertinent part:

> 2-04 *Materials Furnished by the Government:*
>
> *a.* Lumber in grades indicated in the Form of Bid has been or will be procured by the Contract-

ing Officer, and will be stockpiled for the use of the Contractor at the site. Each bidder will submit with his bid a statement of his lumber requirements for each type of building. Lumber up to the amount stated in the successful bidder's proposal will be issued to him without charge at the above designated stockpile. * * *

2-05 *Commencement, Prosecution, and Completion:*

* * * * *

*c.* If the completion of the undertaking to be performed under the terms of this contract be delayed by reason of delay in delivery of materials, equipment, or supplies to be furnished by the Government and which are essential to such performance, such delay shall not constitute basis for any claim against the Government, but the time of performance will be extended for a period equal to such delay.

STATEMENT

In 1943, petitioners, composing the limited partnership consisting of A. L. Coupe Construction Company Inc., the general and managing partner, A. L. Coupe, and E. G. Barker, entered into a contract with the Government to construct 125 buildings for the Manhattan District project in Oak Ridge, Tennessee. (Fdg. 2, Pet. App. 16, 17) After the completion of the work, the partnership was advised to prepare a release which would be required in connection with final payment under the contract. On March 17, 1945, a final payment voucher in the amount of $73,437.16 and marked "final" was sent to the partnership with the request that the certificate of payee thereon be executed along with a re-

lease, as required by the contract, and returned to the Government so that final payment could be made (Fdg. 11, Pet. App. 27). In compliance with this request, Mr. A. L. Coupe, one of the special partners and president of Coupe Construction Co. Inc., the general and managing partner, executed and returned to the Government a release which reads in part as follows (Fdg. 11, Pet. App. 27, 28):

RELEASE

Approved by the Under Secretary of War March 22, 1941.

> The work under contract number W-7421-Eng-4 dated 11-16-43 between the United States of America, represented by E. H. Marsden, Col., Corps of Engineers, as Contracting Officer, and the undersigned contractor, having been completed and finally accepted, the United States, its officers and agents, are hereby released from all claims and demands whatsoever arising under or by virtue of said contract, except as follows:
>
> See list attached.
>
> Executed this 24th day of March, 1945.
>
> COUPE CONSTRUCTION,
> (Contractor)
> By A. L. Coupe[s]
> (Official Title)
> *Partner.*

* * * * *

The attached list, referred to in the release, contained ten specific items of claim along with the amounts claimed as to each item, totaling in all $72,543 (Fdg. 11, Pet. App. 28, 29). Of these claims, three were sub-

sequently allowed by the Contracting Officer; three were allowed by the head of the department; one, relating to deductions by the Government for housing the partnership's employees, was allowed to the extent that it was found that the housing arrangement was not properly a part of the construction contract and that deductions based thereon could not be made from the construction contract; and three were denied (Fdg. 12, Pet. App. 29, 30). The Government continued to withhold its deductions for housing as monies believed to be due and owing it.

Petitioners brought suit in the Court of Claims alleging that the Government had breached its contract in failing to make available at a single location all lumber to be furnished the partnership, in failing to construct and maintain certain roads, in imposing restrictions on the recruitment of labor, and in withholding its deductions for housing the employees (Pet. App. 1). The Government denied any breach of contract and set up as an affirmative defense the release executed in accordance with the contract obligation.

The Court of Claims held that petitioners executed a valid and binding release of all their claims against the Government arising out of the contract except those claims specifically reserved in the release, that only claims so reserved could be sued on and only in the amount set forth in the release, and that, of petitioners' present claims, only those relating to the stockpiling of lumber and the charge for housing petitioners' employees were so reserved (Pet. App. 4-7). The court then found that the Government did not breach its contract in failing to make available at a single location all lumber to be furnished petitioners (Pet. App.

7-12) and that petitioners entered into an implied-in-fact contract to repay the Government, partially, for housing their employees (Pet. App. 12-15).

ARGUMENT

1. Petitioner's primary contention is that the release given the Government is invalid because it was without consideration, beyond the power of the contracting officer to require, and executed without authorization. All of these grounds are clearly without merit, and they present no issue warranting review by this Court.

(a). There was plainly adequate consideration for the release. It was required by and executed pursuant to an explicit provision of the contract, Article 16(d), quoted above (p. 2), a standard clause in Government construction agreements which requires the contractor, as a condition to the receipt of final payment, to execute a release of "all claims and demands whatsoever arising under or by virtue of said contract" *except such as the contractor should specifically reserve.* Of course, the release executed pursuant to this contractual obligation requires no additional or special consideration to make it binding. As was said by this Court in a leading case on the subject, "the contract is itself full consideration." *United States* v. *William Cramp and Sons, Co.*, 206 U.S. 118. That is an elementary proposition in the general law of contracts.

(b). The contracting officer, in requiring petitioner to state all claims he intended to present and to execute a final release of all other claims, did no more than perform his duty and exercise his authority to enforce compliance with the contract. Such authority is recognized in private contract law which indisputably

permits the contracting parties to agree that, upon completion of the work and receipt of final payment, all claims should be stated or forever barred. In making its contracts, the United States generally has the same powers and rights as private individuals. *United States* v. *Tingey*, 5 Pet. 115, 128; *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111. Indeed, a release clause is particularly useful in Government contracts because it enables the contracting agency to be advised of all possible claims against it and to allocate its appropriated funds accordingly. There is no more inconsistency between such a contractual device and the statutory authority of the General Accounting Office to "settle and adjust" claims against the Government than there is between the latter authority and the "disputes" clauses in Government contracts which the Court has repeatedly upheld (*e.g.*, *United States* v. *Wunderlich*, 342 U.S. 98). The standard release provision in Government contracts has also been uniformly upheld and enforced by this Court and the Court of Claims. *United States* v. *William Cramp and Sons Co.*, 206 U. S. 118; *W. C. Shepherd* v. *United States*, 125 C. Cls. 724, 741; *Bein* v. *United States*, 101 C. Cls. 144, 159; *Eastern Contracting Co.* v. *United States*, 97 C. Cls. 341, 355; *P. J. Carlin Construction Co.* v. *United States*, 92 C. Cls. 280, 304.

(c). Petitioners argue that Mr. A. L. Coupe who executed the release did not have authority to do so because he was only a special partner of the contracting partnership, Coupe Construction. However, Mr. Coupe, besides being himself a special partner, was also the president of the corporate general partner, A. L. Coupe Construction Co., Inc., and must be presumed, as the court found on the basis of the course of

petitioners' operations, to have had signing authority in that capacity. To hold otherwise would be to find that Mr. Coupe, the major figure in the contracting partnership, meant to trick or deceive the Government into making final payment without receiving a valid release.

2. Besides being plainly unworthy of review because of its specialized character, the petition's second point —that the Court of Claims permitted the Government to escape liability merely because it was not negligent (although it may nevertheless have broken its agreement)—rests on a clear misapprehension of the holding below. The Court of Claims explicitly found that there was no liability on the part of the Government because the Government did not breach its contract at all. That holding, too, was quite correct. Petitioners' contention was that the Government breached its contract by not stockpiling at a single location all the lumber to be furnished the partnership.[1] The contract does provide that lumber will be stockpiled at the site (Section 2-04, quoted above, pp. 2-3), but it does not specify that all lumber would be available at a single lumberyard. The contract also provides (Section 2-

[1] It is interesting to note that petitioners repeatedly state that the lumber was stockpiled in different places in an area "47 miles long and 20 miles wide" (Pet. 16, 17, and 18). This statement apparently derives from the court's statement in its Finding 6 (Pet. App. 22) that the area "consisted of approximately 60,000 acres, 18 to 20 miles long and 47 miles wide". It is obvious that the court's finding contains a typographical error: "47 miles wide" should be "4 to 7 miles wide", the actual width of the area (Transcript, p. 338). It is not usual to state the width of an area as greater than the length, and besides an area 20 miles by 47 miles would contain ten times 60,000 acres. Even with the typographical error, petitioners transpose the words "wide" and "long" to give the impression of a much greater area.

05(c), quoted above, p. 3) that no claim against the Government could be based on a delay in delivery of Government-furnished materials. Further, the court found (Pet. App. 35, Fdg. 19) that, as a matter of fact, petitioners could obtain all their lumber from a single lumberyard whenever, in accordance with sound construction practice, they gave sufficient advance notice of their requirements, and that any delay caused by unavailability of lumber was due to their own failure to give advance notice (Pet. App. 10).

3. It was the partnership's responsibility under the contract to bear the cost of "all housing, feeding, and transportation of labor for the project" (Pet. App. 41, Fdg. 34). Government-owned hutments were made available to house employees of the various contractors at a charge of 60¢ a night, 20¢ to be paid by the employee and 40¢ by the contractor (Pet. App. 41, 42, Fdgs. 34, 35). The court below found that the partnership was aware of this arrangement, housed its employees in the government hutments, took the necessary steps to see that only actual current employees were housed, was billed for a part of the cost thereof (which cost was deducted from payments due), and never objected to such deductions until all contract work was completed (Pet. App. 42-45, Fdgs. 37-40). Petitioner finds it "inconceivable" (Pet. 18) that the court below should find that the partnership was aware of, and participated in, the hutment arrangement, but consideration of the surrounding circumstances, as set forth in the findings below (Pet. App. 41-45, Fdgs. 32-40), makes it clear that the court's conclusion is unquestionably correct and grounded on substantial evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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